No. 8567

IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA.

CHARLES LUX ET AL.,

Appellants,

vs.

JAMES B. HAGGIN ET AL.,

Respondents.

Brief of Appellants in Reply on Rehearing in Bank.

STETSON & HOUGHTON,
Attorneys for Appellants.

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Of Counsel.

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J. W. McCarthy *Clerk.*

By Frank Hayes *Deputy.*

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Your Honors, after making an order granting a rehearing in this case, made a further order requesting counsel to present their views on three questions: two, rulings of the Court in refusing to admit certain evidence offered by appellants in rebuttal, and one as to whether certain findings were sufficient to justify the denial of the equitable relief prayed for by plaintiffs.

All of these questions are presented and discussed in the points and authorities and brief filed herein by counsel for the appellants, and all are discussed in the oral argument of counsel, which has been printed and filed.

We shall in greater part make this final brief an index referring to our former briefs and argument, and informing the Court at what particular pages can be found our views and the authorities cited by us in support of them upon the specified questions. In addition, we shall simply reply to new points made and authorites cited by counsel for respondent.

I.

DID THE COURT ERR IN SUSTAINING THE DEFENDANTS' OBJECTION TO THE INTRODUCTION OF EVIDENCE BY THE PLAINTIFFS, AFTER BOTH PARTIES HAD ONCE RESTED, TO PROVE WHAT WAS THE CONDITION OF BUENA VISTA SLOUGH, WHERE THE "DE WEBER ROAD" CROSSED IT?

The Court, in selecting this ruling, and requesting counsel to present their views upon it, select but one of some half dozen similar rulings of the Judge of the Superior Court.

This single ruling was no doubt selected by the Court from the fact that it was the first ruling of the Court refusing to admit evidence offered by appellants in rebuttal as to the condition of Buena Vista Slough at points where defendants' witnesses crossed it and testified in relation to its condition.

Mr. McAllister, in his oral argument, has grouped together the kindred rulings, refusing to admit such evidence.

See pp. 15–32, inclusive.

None of such rulings are referred to by any of the numerous counsel who appeared for respondent, nor by any of the new counsel who have made both oral arguments and filed written briefs in this case in aid of respondent's case.

We call special attention to this fact as the chief argument of the attorney of record, Louis T. Haggin, Esq., in support of the ruling of the Court, refusing to permit the witnesses called by plaintiffs in rebuttal to testify as to the condition of Buena Vista Slough at the De Weber Road Crossing, is to the effect that the ruling of the Court is not error, because it does not clearly appear that the two witnesses called by defendant, and whom we claimed testified that they crossed Buena Vista Slough at the De Weber Road Crossing with teams loaded with hay, did in fact cross at that point.

We now present the rulings of Judge Brundage in the order in which they were made, refusing to permit witnesses called by us in rebuttal to testify to the condition of Buena Vista Slough at the different points at which defendants' witnesses claimed to have crossed it and testified as to its condition.

It should be remembered that all the trips made by defendants' witnesses, except one, were made while the trial of the case was in progress, and some of them after we had closed our case in chief.

FIRST OFFER.

E. T. Wright on the Witness Stand.

"Mr. Houghton. What we offer to show by this "witness is, that he, with Mr. Smith, the last witness, "made a cross-section of this DeWeber road at Buena "Vista Slough, at a point where the De Weber road "crosses it, near the place where the old pump "was. Certain witnesses of defendant testify as to "just what that slough was at that point where that "road crosses. We offer to show by this witness that "he cross-sectioned that slough at that point, and what "the result of that cross-section was.

"Mr. Garber. From the instruments?

"Mr. Houghton. Yes, sir; certainly.

"Mr. Flournoy. We object to that. It is merely "a contradiction of our testimony; of a contradiction "of theirs.

"The COURT. There was a number of witnesses who "testified positively as to there being a slough there. "I think there were more witnesses on the part of the "plaintiff testified that there was a slough there than "testified that there was not a slough there.

"By Mr. MCALLISTER. Q—What kind of a survey "did you make there?

"A—We took the elevations and levels across the "channel at that point, and took the width and depth "of the water.

"Mr. FLOURNOY. The testimony offered is merely "cumulative.

"The COURT. I think the testimony of defendants' "witnesses, all of them, upon that point, was not uni- "form, and that the testimony of plaintiffs' witnesses "was that there is a slough down there. It appears "to me it is just simply cumulative testimony.

"Mr. HOUGHTON. We make the offer.

"The COURT. I will sustain the objection.

"[Plaintiffs except.]

"Mr. HOUGHTON. And I understand that, without "recalling Mr. Smith, we can make the same offer to "prove the same fact by him?

"The COURT. Yes, sir; and the same ruling and exception."

Tr., Vol. 5, pp. 27–8, fols. 107–111.

SECOND OFFER.

MCCRAY ON THE WITNESS STAND.

"Mr. HOUGHTON. What I desire to do, without go- "ing into this thing at length, is to show that this "witness has run lines across these swamp lands at "the very points where the witnesses of the defend- "ants have crossed it; not speaking of the levels at "all, but where the other crossings have been made. "I will take this as any illustration, and make the "offer, if your Honor please. I wish to show that this "witness has run a line from the southeast corner of "Section 24, in Township 27 south, Range 22 east, "diagonally across Sections 25 and 35 to the south- "east corner of Section 34 in the same township. And "we offer to show by this witness, also, that he has "made an examination of the natural object along that "line. Then we offer to show by him what he found "in running that line and making that examination,

" and on that line; that he has run a transit line across
" there, and that, if he found any slough or channel,
" he took elevations and measured the width and depth
" of the slough or channel.

" The COURT. Is that objected to?

" Mr. FLOURNOY. Yes, sir; that is the same point.

" The COURT. The objection is sustained.

" Mr. HOUGHTON. Then, if the Court please, we
" make that same offer as to every single line that the
" defendants' witnesses have testified to where they
" have made a crossing of this channel of this swamp.

" Mr. FLOURNOY. The same objection.

" The COURT. The same ruling.

" Mr. MCALLISTER. It is understood that we except
" all along.

" The COURT. Yes, sir,"

Tr., Vol. 5, pp. 38–9, fols. 151–154.

THIRD OFFER.

MCCRAY ON THE WITNESS STAND.

" Mr. HOUGHTON. Then we offer to show, if the
" Court please, that at each one of these lines where
" these witnesses of the defendants testify that they
" have crossed, not only has this line been run where
" they testified to, but that the line has been run by
" this witness from one-half a mile to three-quarters of
" a mile on each side of that line, and that an exami-
" nation has been made between those lines as to all
" the channels and natural features of the country be-
" tween the two lines on each side of the line where
" the defendants' witnesses crossed; and in case he
" found sloughs or channels, or anything of that kind,
" they were leveled and the width of them measured.

" Mr. HAGGIN. We object to that.

" The COURT. The objection is sustained.

" [Plaintiffs except.]

Tr., Vol. 5, pp. 39, fols. 154–5.

This was followed up when the witness, R. T. Harrold, was on the witness stand, by a further offer.

" Mr. HOUGHTON. In connection with this witness
" we desire to make an offer of his testimony as to
" his accompanying Mr. McCray when he ran this
" line across at these different points where the wit-
" nesses of the defendants have testified that they

" went, and also on the side line half or three-quarters
" of a mile each side of that, and that he also accom-
" panied Mr. McCray when he ran along any channel
" of water or slough that they may have found on those
" lines between those points.

" Mr. HAGGIN. We object to any testimony of that
" sort.

" [The objection is sustained, and plaintiffs ex-
" cept.]"

Tr., Vol. 5, p. 46, fols. 180–1.

" Mr. HOUGHTON. If your Honor please, that we
" may not take up the time of the Court, we desire to
" call other witnesses, in connection with those trips
" made by Mr. McCray and Harrold, which we have
" offered to show, crossed this swamp at various points
" where the defendants' witnesses crossed; that they
" have accompanied Mr. McCray on those trips; and
" further, to show what they found on them. We make
" that offer as to this witness, and we wish to save
" calling those witnesses. It seems to me that we
" might as well name our witnesses.

" The COURT. Name your witnesses.

" Mr. HOUGHTON. Then we offer to prove that state
" of affairs by the following witnesses: J. H. Huntley,
" John Beard, A. Noble, T. A. Stoutenburgh, John
" Sturgeon, Robert Burgen and J. T. Williams.

" [The Court makes the same ruling as to the last
" offer made in connection with the testimony offered
" on the stand, to which ruling the plaintiffs except.]"

Tr., Vol. 5, p. 48, fols. 189–191.

FOURTH OFFER.

McCRAY ON THE WITNESS STAND.

" Mr. HOUGHTON. Q—Have you within the last
" thirty days been on the Buena Vista Slough in a
" boat?

" A—Yes, sir.

" Mr. GARBER. I move to strike out that answer.

" The COURT. The motion is granted.

" Mr. HOUGHTON. We make the offer, if the Court
" please, to meet the testimony of Mr. Souther and
" Mr. Macmurdo as to the defect in the channel, and
" also as to the amount of water that will flow in that
" channel; to show that this witness has been on
" Buena Vista Slough, from Headquarters, or from

" Section 15, Norton's Camp, down to the Bonestell " House; and we offer to show by him the width of " the stream during that trip, and particularly at those " points where they claim that there is no depth, and " the depth of the stream, and particularly at those " points where they claim there is no well defined " channel.

" Mr. McAllister. The whole object being to " meet the testimony of Mr. Souther and Mr. Macmur- " do, as to special points on the slough.

" The Court. Gentlemen, it seems to me that this " thing is progressing rather far. In the first place, " as I have reiterated time and again, there has been " testimony, cumulative, introduced by the plaintiffs " in reference to those sloughs from Wible's Camp, in " fact from Buena Vista Lake, down to the north line " of Map Number 2. You are seeking to go into this " whole thing again, by this same witness, who testi- " fied fully in reference to it before, and by other par- " ties who testified before to having been in boats " down that slough. It is but re-opening the whole " case again. I see no end to it. I think the Court " has ruled sufficiently upon that.

" Mr. McAllister. We are only trying to do this: " there were three points made by the other side; the " levels, the crossings and the testimony of Mr. Mac- " murdo. We want to offer as to each of the three " points. There was no idea of making captious " propositions at all. We just make the offer; it is " ruled out and we except. There is no use dwelling " upon it."

Tr., Vol. 5, pp. 40–1, fols. 156–160.

" Mr. Houghton. Then, if your Honor please, we " offer to show by John Beard and J. H. Huntley, that " they accompanied Mr. McCray on the trip which he " made in a boat, down this slough from Headquarters " to the Bonestell House; and further to show what " they found as to the depth and width of that channel " on that trip.

" Mr. Haggin. We object to that.

" The Court. The same ruling.

" Mr. Houghton. And the plaintiffs except."

Tr., Vol. 5, pp. 48–9, fols. 191–2.

The first party sent out to examine the swamp land along Buena Vista Slough consisting of Taylor, Jastro, Cross and Barker, and on cross-examination of Mr. Jastro, one of the party, we drew from him the fact that Mr. Estee, who lived on Buena Vista Slough, acted as a guide and conducted the party across the body of swamp land from a point on the west side, near his house, to the Round Corral.

Tr., Vol. 3, fol. 378.

We call Mr. Estee as a witness, and make our

FIFTH OFFER.

"Q—What did you see when making that crossing "there with those parties as regards sloughs or chan- "nels?

"Mr. HAGGIN. We object to the question.

"The COURT. The objection is sustained.

"[Plaintiffs except.]

"Mr. MCALLISTER. We would like to state, your "Honor, that we offer this testimony in a two-fold "point of view: first, to contradict these witnesses of "the defendants, so far as this witness would contra- "dict them as to what occurred on that trip; and "secondly, in reference to the natural objects which "they encountered—the physical objects which they "encountered.

"Mr. FLOURNOY. There is no objection to proving "that they didn't make the trip, so far as that is con- "cerned. Anything that tends to re-establish the "original case as to channel or slough, we object to."

Tr., Vol. 5, p. 47, fols. 184–5.

SIXTH OFFER.

ESTEE ON THE WITNESS STAND.

"Q—Have you been on this swamp land at any "point north of the Tule House recently?

"A—Yes, sir; I was there last Saturday, I think.

"Q—How far north?

"A—Well, I was about three and a half or four "miles; it might have been three and a half, may be "four. I am not positive as to the distances.

"Q—Did you find at that point water running in a "channel or slough?

" A—Yes, sir.
" Mr. HAGGIN. STRIKE THAT ANSWER OUT.
" The COURT. STRIKE IT OUT.
" Mr. HAGGIN. WE OBJECT TO THE QUESTION.
" The COURT. THE OBJECTION IS SUSTAINED.
" Mr. HOUGHTON. If the Court please, in connection with this we desire to show: Your Honor will remember that the testimony in this case shows where the water was when we closed our case, running down through this body of land. As I remember it, our testimony was that the water had reached Section 33, about eight miles south of the Tule House. Now, we desire to show by this witness what we certainly could not have shown when our case was closed: that he followed this channel down from the point where the water was at that time, and found running water in the slough four miles, or three miles and a half, north of the Tule House. We could not have proved that fact at that time, because it did not exist. *Further, we desire to prove it to contradict the testimony given by Captain Taylor, that he crossed about a mile below the Tule House, and there was no channel.*
" [The proposed testimony is objected to by the defendants. The objection is sustained and the plaintiffs except."]

Tr., Vol. 5, pp. 47–8, fols. 186–189.

SEVENTH OFFER.

The seventh, or last offer made by us was to show by the witness Thomas N. Wills, that he accompanied one of the parties in an attempted crossing, across the tract of swamp land along Buena Vista Slough. Not one of the five parties belonging to that party of six, who were placed on the witness stand, referred to the fact that at any time they had a guide to show them across the swamp land.

The testimony of this witness is very brief, and we produce all of his direct testimony and the numerous rulings complained of.

THOMAS N. WILLS;

" being called as a witness, for plaintiffs in rebuttal, " and sworn, testified as follows:

" By Mr. HOUGHTON. Q—Where do you live?

" A—When I am at home I live on the Island; but " I stop on the swamp a good deal. My father lives " in the swamp; he stops there a good deal with the " hogs, about two miles this side of Dover's and on the opposite side from Dover's.

" Q—Did you see any parties driving around in that " locality in buggies, three or four weeks ago?

" A—Yes, sir.

" Q—Who were they?

" A—Mr. Thornton, Mr. Taylor, Mr. McClung, Mr. " McLane, Pat Murray and Mr. Reading.

" Q—Were they at your father's camp?

" A—Yes, sir; they passed by there, and from there " they went out into the swamp.

" Q—Did you go with them?

" A—Yes, sir.

" Q—As a guide?

" A—Yes, sir.

" Q—How far did you go with them?

" A—I took them pretty nearly a mile, and they " turned back—about a mile and a half, I think, out " into the swamp.

" Q—What made them turn back?

" A—THEY CAME TO A SLOUGH—

" Mr. HAGGIN [interrupting]. I OBJECT TO THAT " AS IMMATERIAL.

" Mr. FLOURNOY. I MOVE TO STRIKE OUT THE " ANSWER.

" The COURT. THE MOTION IS GRANTED.

" Mr. MCALLISTER. WHAT IS THE QUESTION " WE HAVE ASKED?

" The COURT. THE WITNESS ANSWERED IT, " AND IT HAS BEEN STRICKEN OUT ON A MO- " TION.

[" Plaintiffs except.]

" Mr. HOUGHTON. Q—What did they say, if any- " thing, at the point where they turned back?

" A—They talked like it was boggy. Mr. McClung " first spoke about turning back; he said that they " wanted to go over to the road across the swamp. He " didn't say anything to me; they were talking to them- " selves.

" By the COURT. Q—Have you named all of the " parties who were there?

" A—Yes, sir; six of them.

" Mr. MCALLISTER. Q—State what any of the par- " ties then and there said. Do you recollect that they " said anything?

" A—Not to me.

" Q—Among themselves what did they say, any of " them?

" A—They were talking among themselves, and I " could not hear what they said.

" Q—Did you hear any of them say anything?

" A—No, sir; not that I could hear.

" Q—You started to say something that Mr. Mc- " Clung said.

" A—They objected to it.

" Mr. HOUGHTON. Go on and tell what Mr. Mc- " Clung said.

" A—He talked as though he didn't want to go—

" Mr. MCALLISTER [interrupting]. That's right; " give the substance of it, if you cannot recollect the " words.

" Mr. GARBER. We object to that.

" The COURT. Give us the language; tell what he " said. What did Mr. McClung say?

" Mr. MCALLISTER. Q—Do you recollect what he " said?

" A—No, sir.

" Q—Did he say anything?

" A—He didn't say anything to me; I didn't hear " what he said; they were talking.

" Q—Did you hear anything that was said among " themselves, by any one of them?

" A—Well, I didn't hear much, only about the " slough; that is all that I heard.

" Mr. HOUGHTON. What did they say about the " slough?

" A—They said it was boggy, and they would rather " not cross it; and they told me to take them back " across the swamp, back towards Harrold's camp.

" Q—Where were you when they said this?

" A—I was right out in the swamp, about right " south of Harrold's camp.

" Q—Were you ahead of them?

" A—Yes, sir; I was ahead just a little ways, may " be thirty or forty yards.

" Q—Were you in the slough when they said that?

" Mr. HAGGIN. We object; it is simply a question " of what he heard.

" The WITNESS. I went into the slough.

" Mr. HOUGHTON. Q—You were on horseback?

" A—Yes, sir; I was on horseback.

" Q—Did you drive into the slough yourself?

" A—Yes, sir.

" Q—How deep was the water there?

" A—I COULD NOT TELL HOW DEEP, BUT " IT ALMOST SWAM ME ON HORSEBACK.

" Q—Was it after you had driven in there that these " remarks were made by them?

" A—Yes, sir.

" Q—What did they say?

" A—They said they had rather turn back.

" Q—Did you come out then?

" A—Yes, sir; I came out then. I went on and " crossed and then turned and came back, and led " them back to the tules.

" Q—DID YOU IN GOING OUT THERE WITH " THEM CROSS ANY SLOUGHS?

" Mr. HAGGIN. I OBJECT TO ANY TESTIMONY " OF THIS WITNESS.

" By Mr. HOUGHTON [interrupting]. Q—IN GO- " ING OUT THERE DID YOU TAKE THEM " ACROSS ANY SLOUGHS?

" Mr. HAGGIN. WE OBJECT.

" [THE OBJECTION IS SUSTAINED, AND " PLAINTIFFS EXCEPT].

Tr., Vol. 5, pp. 52–5, fols. 206–216:

EIGHTH OFFER.

The eighth offer was made in connection with the testimony of G. W. Smith, who had, with three other surveyors, run a level line across the body of swamp and overflowed land, along the same drag line made by Macmurdo and Fillebrown, along which they ran the level line they so fully testified in relation to, and of which survey they put in no less than four profiles.

Both Macmurdo and Fillebrown testify that in running this level line they came to a pond, but that it had no inlet or outlet.

Smith, when on the stand testifying to coming to this pond, we desired to show by him whether or not it had an inlet or outlet, and made the eighth offer:

"Mr. HOUGHTON. We have one more offer to make " in connection with that. We offer to show by this " witness that at the pond which he found at Station 132, " in making this survey, and which appears upon this " profile, that he examined the pond, and found both " an outlet and an inlet to that pond.

"Mr. MCALLISTER. Which pond we claim to be the " same pond spoken of by Mr. Macmurdo and Fille- " brown.

" Mr. FLOURNOY. I OBJECT.

" The COURT. THE OBJECTION IS SUSTAINED.

" [Plaintiffs except.]"

Tr., Vol. 5, pp. 11–12, fols. 43–4.

The same offer when E. T. Wright was on the witness stand:

" Mr. HOUGHTON. We desire to prove by this wit- " ness the same state of facts that we offered to prove " by the others. I don't suppose it is necessary to " repeat it.

" Mr. MCALLISTER. We propose to show by him " the same as we offered to prove by Mr. Smith, which " your Honor ruled out.

" Mr. HAGGIN. WE OBJECT.

" The COURT. THE SAME RULING.

" [Plaintiffs except.]"

Tr., Vol. 5, pp. 23–4, fols. 91–2.

And also to the following offer:

" Mr. HOUGHTON. Q—We make the offer to prove " by this witness that, at these crossings where he ran " the level across where these depressions appear, he " found well-defined channels, and followed them north " and south, and that they were continuous, and did " not run out.

" Mr. FLOURNOY. WE OBJECT.

" [The objection is sustained, and the plaintiffs ex- " cept.]"

Tr., Vol. 5, p. 24, fol. 93.

When Mr. McCray is on the stand, we tried to reach the same thing by specific questions:

"Q—In running that line across there, did you find "a pond to the south?

"A—Yes, sir.

"Q—Opposite what station was that?

"A—132. We ran around that pond.

"Q—Have you a plat of that pond, or a survey of "it, where you ran around it?

"A—I have a survey of it; yes, sir. I have it with "me. [Witness produces it.]

"Q—What does that show, that survey?

"A—It simply shows the meander of that pond; that "is all. It shows the courses and distances around "it from the point where we left to where we came "back on the other side to the straight line. It simply "shows the courses and distances around it and then "back to the line.

"Mr. HOUGHTON. Now, we offer in evidence, if the "Court please, that survey or meander around that "pond.

"Mr. HAGGIN. WE OBJECT TO IT.

"The COURT. THE OBJECTION IS SUSTAINED.

"Mr. HOUGHTON. Plaintiffs except.

"Q—You say you came to this pond at the one hun-"dred and thirty-second station?

"A—Well, I came to a point opposite the pond. "The elevation at that station was 89.57.

"Q—What was the elevation of Station 131?

"A—92.84. The elevation of Station 133 was 93.83.

"Q—What did you find in running that line between "Stations 131 and 133?

"A—I took six elevations.

"Q—Now, I will ask you what you found? What "was between Stations 131 and 133?

"A—I FOUND A SLOUGH.

"Mr. HAGGIN. ONE MOMENT. I MOVE TO "STRIKE OUT THAT ANSWER.

"The COURT. THE MOTION IS GRANTED.

"Mr. HOUGHTON. Plaintiffs except.

Tr., Vol. 5, pp. 34–5, fols. 134–137.

"The COURT. You can state what you offer to show "by this witness that he found between certain sta-"tions.

"Mr. HOUGHTON. I offer to show by this witness

" that he found between Stations 131 and 133 a slough
" running out of the lake or pond which he has re-
" ferred to, opposite that station, and I offer to show
" by him the slope of the eastern bank of the slough
" and also of the western bank of that slough where
" he crossed it. And I further offer to show by this
" witness that he followed that slough both ways and
" found a continuous channel from it.
" The COURT. IS THERE ANY OBJECTION?
" Mr. GARBER. WE OBJECT.
" The COURT. Objection sustained.
" [Plaintiffs except.]"

Tr., Vol. 5, p. 36, fols. 140-1.

This Court will see that by the numerous and varied offers made by us, we covered every possible point that could be made against such offers on the ground that they were not sufficiently full and clearly made.

The very point, now for the first time made by counsel, we anticipated when we offered to show that our witnesses had trailed the wagon tracks of the parties sent out by defendants to examine and cross Buena Vista Slough as certain selected points; and for fear it might be claimed that we had not kept in the track of the witnesses of defendant, who had crossed this body of tule land, at a time when the tules were from ten to twelve feet high, when they could see neither to the right or left without standing up in their buggies—(See pp. 343-346 of our "Points and Authorities" filed herein, where the testimony is given showing the condition of the body of swamp and overflowed land when these examinations were made by defendants' witnesses)—we made a broader and more comprehensive offer, *i. e.*, not only to show the condition of the channels through the body of swamp and overflowed land where crossed by defendants, but the condition of the channels for from one-half to three-quarters of a mile north and south of such crossings.

The rulings of Judge Brundage on this offer, and our objections to them, and the authorities in support of such objections, have been fully presented by us in our former briefs, and also by Mr. McAllister in his oral argument.

We refer this Court to

Appellants' Points and Authorities, pp. 63–84;
Appellants' Brief in Reply, Part I, 308–311;
McAllister's Oral Argument, pp. 1–32;

And additional authorities cited on pages 42–45 of McAllister's oral argument.

The point now made by Mr. Haggin will hardly be considered by this Court after a ruling upon an objection made by him "to any testimony" a witness may give, and a ruling in his favor upon such an objection.

"Did you, in going out there with them, cross any "sloughs?

"Mr. HAGGIN. I object to any testimony of this "witness—

"By Mr. HOUGHTON [interrupting]. Q—In going "out there did you take them across any sloughs?

"Mr. HAGGIN. We object.

"[The objection is sustained, and plaintiffs except.]"

Nearly all the cases cited by respondents' counsel in their former brief in support of the rulings of Judge Brundage, in refusing to admit testimony in rebuttal in relation to the condition of Buena Vista Slough at certain points, are cases where the Court had exercised its discretion in ruling out evidence by which the plaintiff sought to open his case, and the appellate Court held that the refusal was no such abuse of discretion as would warrant a reversal of the judgment of the lower Court.

A fair sample of the cases cited by defendants' counsel is that of

Kohler v. *Wells, Fargo & Co.*, 26 Cal., 613.

In that case certain evidence was offered in rebuttal.

The Court say, pp. 613–614:

"The defendants objected, on the ground that this "evidence should have been offered on the plaintiffs' "original case before he rested. The Court sustained "the objection, and plaintiff excepted. This ruling "presents the most important question in the case. "It must be borne in mind that the plaintiff had of- "fered no proof at all on this point; yet it was a point "upon which proof was essential to his recovery. He "did not now, so far as appears by the record, show "to the Court that he had, through any mistake in "law, or from any inadvertence, omitted to introduce "evidence on this point, and upon some reasonable "cause shown, appeal to the discretion of the Court "to open his case and permit him to supply the de- "fect. But he simply relied upon his right to intro- "duce the testimony by way of rebuttal. It was tes- "timony that clearly belonged to the original case of "the plaintiff, and should have been introduced be- "fore he rested, for if it intended to prove anything "material, it was that Kohler did not deposit a lead "bar. A plaintiff has no right to keep back all his "testimony on any material point until he draws out "the testimony of the other party, and then come in "with his own. This would give him an undue ad- "vantage, contrary to the rules of law, and if he "does so reserve his testimony deliberately and wil- "fully, the Courts will not allow him to come in after "the defendant rests and make out his case. But "whether the plaintiff will be permitted to reopen his "proofs or not, is a question which rests very much "in the discretion of the Court below, upon con- "sideration of the circumstances surrounding the par- "ticular case.

"*As testimony in rebuttal, it did not rebut any evidence "that was material to the defense, as the case stood "on plaintiff's tesimony.* Nor did it rebut any testi- "mony upon any affirmative defense set up by de- "fendants. We think there was no error in excluding "the testimony. It is remarkable, that even here, the "plaintiff did not offer his own testimony to show that "he did not, in fact, deposit a lead bar, but the testi- "mony of his bookkeeper to show that he deposited a "gold bar on that day."

One case cited by respondent's counsel clearly states what evidence may be introduced in rebuttal, and the rule laid down by Mr. Chief Justice Bigelow is the same as we have always contended for in this case:

"The evidence offered in reply to the testimony of "Dr. Hayes was rightly rejected. *At the stage of the "trial which the case had then reached, no evidence, "strictly speaking, was competent, except such as tended "to control the evidence offered by the plaintiffs in rebuttal "of that introduced by the defendant.* If the evidence "offered was not of this character, its admission or "rejection was entirely within the discretion of the "Court. *So far as we can judge from the statement in "the Bill of Exceptions, the evidence which was rejected "had no tendency to contradict any new fact which had "been proved by the testimony of Dr. Hayes.* As it was "not offered to impeach *or contradict him*, its rejec-"tion is not a matter which can form a valid ground "of exception.
"Exceptions overruled."

Briggs v. *Humphrey*, 5 Allen, 316.

In making our offer of this testimony we stated that we did offer it to impeach or contradict the witnesses called by defendants:

"Mr. McAllister. We would like to state, your "Honor, that we offer this testimony in a two-fold "point of view; first, to contradict these witnesses of "the defendants, so far as this witness would contra-"dict them as to what occurred on that trip; and sec-"ondly, in reference to the natural objects which they "encountered, the physical objects which they en-"countered."

Tr., Vol. 5, p. 47, fols. 184–5.

The Court will see to what length counsel for respondent are willing to go to present a case that will support the rulings of Judge Brundage in refusing us permission to call witnesses to show the condition of Buena Vista Slough at points where defendants' witnesses crossed it, and to impeach the testimony of such witnesses.

In their brief heretofore filed in this case, counsel have devoted over one hundred pages to showing that our witnesses testified that there was no channel from Wible's Headquarters to Bonestell's that could be called a watercourse.

We called attention in our brief in reply to the manner in which it was sought to show this, by giving only such portions of the evidence of a given witness as favored their view of the case, omitting the balance, whether it was a new question or sentence, or only a part of a question or sentence, and nothing to indicate that all the testimony on the point was not given.

See Appellants' Brief in Reply, pp. 7–13.

Now, to sustain the ruling of Judge Brundage, in refusing us leave to call witnesses to testify to the condition of Buena Vista Slough at certain points where defendants claimed to have shown there was no slough or channel, counsel seem to be willing to abandon their former theory that there is no such channel, and devote one-half of the pages of a 94-page brief to giving at length the testimony of our witnesses, showing that there is a well-defined channel through the whole of Buena Vista swamp, from Kern River to Tulare Lake.

Mr. Haggin, who wrote this brief, prefaces the testimony of the witnesses with the following:

"C.

"The evidence offered by plaintiffs in rebuttal was "inadmissible and properly rejected for the reason, "that in their opening case, they did give evidence as "to the condition of the slough at the De Weber "Crossing, and at every other point along its sup- "posed course, *going fully and with the most minute* "*detail and particularity into the very question upon* "*which they offered rebutting testimony. They did not* "*in their opening confine themselves, as is contended by* "*Mr. McAllister, to proving* GENERALLY a *continuous chan-*

" *nel, but endeavored to show* SPECIFICALLY, *section by sec-*
" *tion, foot by foot, a continuous, well-defined channel of*
" *given width, depth and capacity throughout the whole of*
" *Buena Vista swamp, from Kern River to Tulare Lake.*
" THEY GAVE EVIDENCE AS TO THE EXISTENCE OF THE
" CHANNEL AT EVERY POINT THROUGHOUT THAT DIS-
" TANCE."

Mr. Haggin's Brief for Respondent on Rehearing, pp. 29–30.

Counsel have referred the Court to the testimony of no less than *thirteen* (13) witnesses, all called by plaintiffs, all who testified that this is a well defined channel down to Bonestell's, if not to Tulare Lake.

And in their former briefs, counsel rely mainly upon the evidence of the same witnesses to show that there is no channel.

The Court will notice that most of the witnesses whose testimony is now copied into this short brief, are witnesses who had resided on Buena Vista Slough for years, or who have been in charge of cattle on the slough for years, none of them less than eight or ten.

Counsel should also have referred to the testimony of the engineers of the defendant, who meandered Buena Vista Slough down to Bonestell's, and who made a map of this slough which the defendants put in evidence "Exhibit I," showing a well defined slough from where Kern River enters Buena Vista Slough, down to Bonestell's, or Sec. 24, T. 29 S., R. 23 E., a distance of over fifteen miles.

Both Macmurdo and James testified that Buena Vista Slough is correctly delineated on the map and from a survey made by them following along its banks.

Macmurdo and Fillebrown (another engineer of defendants), testified that they followed along the bank of the slough from Headquarters to Bonestell's, while the case was on trial, and Mr. Cruso, who accompanied Mr. Macmurdo on his trips—a witness for defendant—

testified that he found a well defined slough from the Headquarters to Bonestell's.

After all this work has been done and this strong evidence in support of the position we have always taken that there is no evidence to support the finding that finds that there is no water-course down through the body of swamp and overflowed land. After all this evidence is copied into a brief, it seems to have occurred to counsel that this Court may very naturally say that if all this evidence was given by these witnesses who are all of them familiar with this country, who have spent the best years of their lives in business pursuits on and along Buena Vista Slough, and defendant's engineers, have also testified as to the existence of such slough, have been able to make a meander survey of it and after defendants have put a map of such survey in evidence, where is the evidence to meet this? Where is the evidence in support of this finding? Anticipating that this Court may ask such questions, we find on page 65 of this brief of Mr. Haggin, the following:

"We deem it proper to here call your Honor's attention to our former brief in this cause. Part 1, page 105 to 222, wherein we have conclusively shown that notwithstanding many of plaintiffs' witnesses testified both generally and specifically to the existence of sloughs and channels within the swamp, there is in fact no slough or channel, or system of sloughs and channels therein, which could support or justify a finding of watercourse."

We respectfully submit that either this finding that there is no watercourse through our land is not supported by the evidence; that is, that there is no evidence in support of the finding, or it was error in the trial court to refuse to permit us to show that there was no break in the channel at the few points where defendants' witnesses testified to having been across this tract of swamp and overflowed land and found no channel, and for one of these reasons the judgment entered in this case must be reversed.

Shifting ground at this late day cannot aid the respondent.

If they stand by the finding as they have heretofore, it clearly appears that it is not supported by the evidence.

If they abandon that position and rely upon the ruling of Judge Brundage, then it was error to refuse us leave to rebut the defendants' evidence as to the condition of Buena Vista Slough at the few points where defendants' witnesses testified that they crossed it and testified that they found no channel.

We had a right to rebut the defendants' evidence as to that fact—channel or no channel—by any relevant testimony to prove the fact that there was a channel or to overcome the defendants' evidence.

The rule we have always contended for in this case, has in a recent case, decided by this Court in bank, been clearly announced as the Court rule governing the introduction of evidence in rebuttal. We refer to the case of

> *People* v. *Cunningham*, No. 20,002, decided by this Court in bank, April 27, 1885, 6 W. C. Rep., p. 333.

The Court say:

"When the defendant rested upon the evidence "given in his defense, the fact whether he took and "drove away Trimble's cattle, with a guilty purpose, "was before the jury upon conflicting evidence, and, "as the fact was directly in issue, and one of the ma- "terial facts in the case, which the State was bound "to prove, *the State had the right to rebut the defendant's "evidence as to that fact, by any relevant testimony*, THAT "IS, BY ANY TESTIMONY WHICH HAD A LEGAL TENDENCY TO "PROVE THE FACT. IF THE EVIDENCE OFFERED TENDED TO "PROVE THE FACT, OR, IN OTHER WORDS, TO OVERCOME "THE DEFENDANT'S EVIDENCE AS TO IT, IT WAS ADMISSIBLE "FOR THAT PURPOSE, although it may have also tended "to prove the commission of another distinct and "separate offense."

II.

DID THE COURT ERR IN SUSTAINING DEFENDANTS' OBJECTION TO THE INTRODUCTION BY THE PLAINTIFFS OF THE CERTIFICATES OF SALE BY THE STATE OF THE LANDS CLAIMED BY PLAINTIFFS?

The Court did err in not admiting in evidence the certificates of purchase offered in evidence.

(a) The objection urged to their admission in this Court, that they were not admissible under the pleadings, is one not made at the trial Court, and cannot be made in this Court for the first time.

This rule is one well established in this State, and this Court has, within thirty days, announced its adherence to this rule previously established by numerous decisions of this Court.

Any and every objection to the introduction of evidence that can be removed in the trial Court must be made in such Court, so that the party against whom the objection is made may be given an opportunity to supply the defects or amend his pleadings as the case may require.

In the case of

Scott v. *Sierra Lumber Co.*, No. 8775,

decided by this Court in bank, May 25, 1885, 6 W. C. Rep., p. 551, the Court say:

" The testimony that the sale was not for cash, nor " as required by the special power, was admitted with- " out objection on the part of the plaintiff. *Had ob-* " *jection to the testimony been taken in the Court below* " *the answer might have been amended so as to render it* " *strictly admissivle.* Stringer *v.* Dams, 30 Cal., 318; " Clark *v.* Phœnix Ins. Co., 36 id., 175. *But a party* " *cannot for the first time in this Court, object on any*

" *ground, to evidence which was introduced by the adverse*
" *party at the trial in the Court below, without objection*
" *made thereto.* Bliss *v.* Ellsworth, 36 Cal., 310. *Where*
" *evidence is not objected to in the Court below, because not*
" *admissible under the averments of the answer, it is too*
" *late to raise the objection in the Supreme Court.* Hutch-
" ings *v.* Castle, 48 Cal., 152; Henry *v.* S. P. R. R. Co.,
" 50 id. 176."

And the cases cited by this Court in its decision in *Scott* v. *Sierra Lumber Co.*, fully sustain the position.

In the case of

Henry v. *S. P. R. R. Co.*, 50 Cal., 181,

a motion was made to strike out certain evidence upon certain grounds, but not on the ground that it was inadmissible under the pleadings, and the Court by Mr. Justice McKinstry, say:

" *The motion was not based upon the ground that the*
" *testimony was inadmissible under the averments of the*
" *complaint, and that objection cannot first be made here.*
" Where a motion is made to strike out testimony, the
" moving party should specify his objections to the
" testimony with like particularity as is required in
" pointing out an objection to a question."

And in the case of

Hutchings v. *Castle*, 48 Cal., 155,

the Court, again, by Mr. Justice McKinstry, say:

" The answer is perhaps obnoxious to the criticism
" of counsel, that it neither states the facts consti-
" tuting fraud, nor distinctly avers that the parties
" were guilty of actual fraud, independent of fraud
" conclusively presumed from the want of delivery and
" change of possession. But the pleading was not
" demurred to, *nor did the plaintiffs object to the evi-*
" *dence tending to prove the fraud, when it was offered, on*
" *the ground that it was inadmissible under the averments*
" *of the answer. There was a question addressed to the*
" *Court which intimated an objection, and some conversa-*
" *tion on the subject (which is carefully preserved in the*
" *transcript), but no specific objection.* IT IS TOO LATE
" TO MAKE IT IN THIS COURT FOR THE FIRST TIME."

(b) The evidence which the certificates of purchase were intended to contradict or rebut was evidence offered by defendant in support of an affirmative defense.

That is, offered by them under and in support of defendants' third answer, which commences as follows:

"For a third, further, separate and distinct an-
"swer and defense to plaintiffs' amended com-
"plaint * * * defendant, etc."

Tr., Vol. 1, fol. 210.

This was new matter which defendants claimed constituted a defense to an action, and was by Section 462, C. C. P., deemed controverted by plaintiffs.

When we proved title to the land along Buena Vista Slough, and that the water of Kern River ran into and down that slough and through our land, plaintiffs had established a *prima facie* case, and if the defendants claim the right to divert the water of Kern River from the land of plaintiffs, it was incumbent upon them to establish their right so to do.

In the case of

American Co. v. *Bradford*, 27 Cal, 363,

a suit to restrain defendant from diverting water from Deadwood Creek, the defendant set up an affirmative defense, claiming a prior right to the water of Deadwood Creek, and it was held that the burden was upon the defendant under this defense. That such "de-
"fense was, within the language of the forty-sixth
"section of the Practice Act, *new matter* which was
"necessary to plead in order to become available for
"the defendant. (*McKyeing* v. *Bull*, 16 N. Y., 307.)"

American Co. v. *Bradford*, 27 Cal, 367.

The case of

Haight v. *Price*, 21 N. Y., 241,

was an action brought by a lower riparian proprietor to restrain the defendant from diverting the water of a stream called Trout Run.

The Court, by Denio, J., say (pp. 244–6):

" The plaintiff's possession of the land on which his " brick yard was situated, and through which the water- " course ran, was *prima facie* evidence of ownership in " him. As such owner he was presumptively entitled " to have the stream run in its natural channel, with- " out obstruction or diversion. It is true that when " he went into possession he found that the water had " been diverted by the defendant's dam above, and it " is to be inferred that such diversion had been ac- " quiesced in by the parties who had preceded him in " the possession, and such acquiescence was continued " on his part until the commencement of this action. " But the whole period, during which the several suc- " cessive proprietors forbore to assert their right to " have the water returned to its natural channel, was " not sufficient to raise the presumption of a title so to " divert it."

* * * * * *

" *It is urged that this presumption should attach in the* " *absence of any proof to the contrary, because the plain-* " *tiff holds the affirmative in this action, and because,* " *moreover, everything must be deemed to have been right-* " *fully and lawfully done, unless the contrary be shown.* " *This reasoning is not satisfactory to my mind. Assuming* " *that the defendant's ownership of both parcels at the time* " *he diverted the stream from the lower one would have* " *concluded his subsequent grantee of that parcel, the sug-* " *gested unity of ownership was a fact which the defend-* " *ant was bound to prove on his own part. The diver-* " *sion was, prima facie, a wrong, and though in its* " *nature it was capable of excuse or justification, by proof* " *of the existence of other facts which would render it* " *lawful, the burden of showing the existence of such facts* " *was upon the defendant.*"

See 2 Greenl. Ev., § 539.

See also:

Smith v. *Miller*, 11 Gray, 148.

"In *Wright* v. *Howard*, 1 Sim. and St., 190, the " Vice-Chancellor of England Stated the principle of " the right to the use of the waters of rivers very clearly. " *The principle is as applicable here as it is in that coun-* " *try, and there can be no other, in reason or justice, any-* " *where.* He observes that '*prima facie*, the proprietor " ' of each bank of a stream is the proprietor of half " ' the land covered by the stream, but that there is " ' no property in the water. Every proprietor has an " ' equal right to use the water which flows in the " ' stream, and, consequently, no proprietor can have " ' the right to use the water to the prejudice of any " ' other proprietor without the consent of those pro- " ' prietors who may be affected, and no proprietor " ' can either diminish the quantity of water which " ' would otherwise descend to the proprietors below, " ' or throw the water back upon the lands of those " ' above. *Every proprietor who claims a right either to* " ' *throw the water back above or to diminish the quantity* " ' *which is to descend below, must in order to maintain* " ' *his claim, either prove an actual grant or license from* " ' *the proprietor affected by his operations, or must prove* " ' *an uninterrupted enjoyment of twenty years.*' "

In Matter of Water Commissioners, 4 Edw. Ch., 552.

(c) We were not, by stating in our complaint that the lands described in the amended complaint were conveyed to us at a certain date, concluded from showing that we had either a legal or equitable claim or title prior to such date.

" Generally speaking, it is not necessary in plead- " ing to allege with great particularity and certainty, " matter relating to time and place." * * *

2 Wait's Practice, 317;

Martin v. *Kanause*, 2 Abb. 330.

" Under the former practice it was necessary to " state the time when every material and traversable " fact happened, *although it was not generally necessary* " *to prove the time as alleged.*"

1 Wait's Practice, 317.

The strictness of the old rule has been relaxed by the Code, and it is now only necessary to state the time when a fact happened where it is material to constitute a cause of action. But it is not important to specify the precise time when an event or fact happened, if the fact without the time would be sufficient to constitute the cause of action.

2 Wait's Pr., 317–18;
People v. *Ryder*, 12 N. Y., 433;
Stark v. *Barrett*, 15 Cal., 362.

"The plaintiff must state his title sufficiently, if at "all, but is not bound to prove the same title as he "alleges; for the disturbance is the gist of the action, "and title is only inducement."

Gould on Water, § 478.

Judge Stanly, in his argument filed in this case (page 177), says:

"The certificate actually offered, the particular one "which was the basis of the ruling, bore date *September "30th*, 1872, *five months after the adoption of the "Code provisions referred to.*"

If this were so we do not see that it would change our rights, but in this he is in error. It is true this was the first certificate offered in evidence, but it is followed by a great number of others, the most of them (twenty) dated January 28, 1870.

Tr., Vol. 5, fols. 284 to 347, and fols. 380 to 387.

And after all such certificates had been offered in evidence, the Court says:

"The COURT. These offers are all made in connec- "nection with the first one, and under the same prop- "osition?

"Mr. MCALLISTER. Yes, sir. I understand the "ruling is the same, and the exception is the same, all "the way through.

"The COURT. Yes, sir."

Tr., Vol. 5, fol. 388.

So the basis of the ruling complained of was not confined to the certificate of purchase issued in September, 1872, and after the adoption of the Code of Civil Procedure, but covered all the certificates of purchase issued all the way from January 20, 1870, down to February 1, 1877.

We refer your Honors to the following pages of our former points and authorities and briefs filed in this case, where will be found a long line of authorities in support of our contention, that it was error to refuse to admit in evidence the certificates of purchase for the land described in our patents.

Appellants' Points and Authorities, pp. 92–6.
Appellants' Brief in Reply, part II, pp. 27–48.
Oral argument of Mr. McAlister, pp, 32–61.

There is but one view that can be taken of the ruling of Judge Brundage in refusing to admit in evidence the certificates of purchase under which it can be sustained, and that is that the introduction of the patents was evidence that all steps resulting in the issuance of such patents had been regularly performed, and that it therefore appeared when we offered the certificates in evidence that we must have had title to the land in suit, or to some of it, prior to the posting of the notice at the head of the Calloway Canal, and therefore it was immaterial when the certificates of purchase were issued.

This, we submit, is the only answer that can be made to our position in relation to ruling out the certificates of purchase, and if we are correct in this, and if for this reason it was not error to rule out the certificates of purchase, then the judgment must be reversed for the reason that the second finding is contrary to the evidence.

This is a point made in our points and authorities (pages 103–4–5), and in our brief in reply (pages 29

31), heretofore filed, and it is a point that counsel for respondent have never attempted to answer.

We, in our points and authorities, pages 103–4–5, made the point that that portion of the second finding which found that ***"the plaintiffs had not, prior "to the issuance of said patents, any right, "title, interest, claim, demand or possession, "legal or equitable, of, in or to said lands, "or any part thereof,"*** was contrary to the evidence, as it appeared upon the introduction of the patents in evidence that our title related back at least one year from their respective dates.

And in our brief in reply, we again make the point, pages 29–31.

Mr. McAllister in his oral argument again urges it.

But not one of the numerous counsel in this case, seem able to answer it.

We submit that the views urged by us, are unanswerable.

That it affirmatively appears from the patents and deeds in evidence, the only evidence of title offered, (defendants offered no evidence as to title,) that the plaintiffs had a claim to and equitable title in all of the land for which they received patents from the State of California, before the patents were issued.

The time when the patent was issued by the State of California was immaterial, except to defeat a plea of the Statute of Limitations; the patent was the last act of a series of proceedings taken to acquire title from the State, the first being the filing of an application for the land with the County Surveyor of Kern County, followed by approval and payment, and the patent when issued takes effect, by relation, at the date of the first act, the filing of the application to purchase. This application must have been filed more than one year before the patent issued, as no patent can issue

within one year of the approval of the application, and unless an applicant pays twenty per cent. and interest within fifty days after approval, he forfeits his right to the land.

Act of March, 28, 1868, § 23; Acts 1867–8, p. 507; Sec. 3521, P. C.

The patent when issued is evidence that all former steps resulting in such patent have been regularly performed.

Stark v. *Barrett*, 15 Cal., 366;
Yount v. *Howell*, 14 Cal., 466.

Again, it is a "disputable presumption that official "duty has been regularly performed."

Sub. 15, § 1963, C. C. P.

The patent from the State of California as the deed of the State is to be regarded *as if it had been executed at the time the first step was taken to acquire the title.*

Leese v. *Clark*, 18 Cal., 572.

"*Upon all the matters of fact and law essential to au-*
"*thorize its issuance, it imports absolute verity.*"

Leese v. *Clark*, 18 Cal., 572, and cases cited;
Best v. *Polk*, 18 id., 265–118;
Bissell v. *Henshaw*, 1 Sawy., 567–579.

The Supreme Court of the United States, in its decision in

Best v. *Polk*, 18 Wall., 118,

Say:

"It has been frequently held by this Court that a "grant raises a presumption that the incipient steps "required to give it validity have been taken."

The legal presumption always is that public officers have performed their duty, and as it was the duty of the Governor and Surveyor-General not to issue a patent within one year after the approval of a survey,

and unless payment of at least twenty per cent. of the purchase price and interest had been paid within fifty days after such approval, the legal presumption arises from the existence of the patent that the proper approval had been had, and proper payment made, within the time required by statute after such approval and payment.

This Court has held that when a certificate of purchase had been issued for certain land by the Surveyor-General which could only issue legally prior to a certain date, that the party holding the certificate was entitled to the presumption that the officer who issued the patent had regularly performed his duty, and that he would not have issued the patent had not such party obtained the certificate of purchase within the time required by the statute.

Upham v. *Hopkins*, 62 Cal., 259.

Counsel now concede that our title relates back to the year 1872.

On page 87 of the brief of Mr. Haggin for respondent, on rehearing, he says:

"Plaintiffs deraign title from the State of California "under the swamp and overflowed land laws, to wit: "the Act of March 28th, 1868, Statutes 1867–8, p. "507, and Title VIII, Part III, of the Political Code."

And this is true. It appears by the patents in evidence that we deraign title under the Act of March 28, 1868.

Every patent refers to certain numbers of surveys of swamp and overflowed land in Kern County.

Patent of January 18, 1876, to

"Surveys Nos. 233, 234, 235 and 236, swamp and "overflowed land, Kern County."

Tr., Vol. 2, fol. 23.

Patent of February 17, 1876, to
" Surveys Nos. 294, 295 and 296."
Tr., Vol. 2, fol. 36.

Patent of September 11, 1876, to
" Surveys Nos. 102 and 103."
Tr., Vol. 2, fol. 44.

Patent of June 15, 1877, to
" Surveys Nos. 69 and thirteen others, and portions " of seven other surveys."
Tr., Vol. 2, fol. 53.

All these surveys were made under the Act of March 26, 1868, which remained in force until superseded by the Political Code.

Under the Act of 1868, a party who desired to purchase swamp and overflowed land filed his application with the County Surveyor of the county in which the land was situated. The County Surveyor was required to make a survey of the land.

Sec. 29, p. 514, Acts of 1867–8.

The Surveyor General, upon receipt of the *application for a survey*, was required to indorse the date of its receipt on it, and he was required within thirty days to complete the survey, plat and field notes, and then forward duplicate copies of such surveys to the Surveyor General for his approval.

The County Surveyor, on receipt of an "approved survey" from the Surveyor General, was required to mark it on a map in his office, etc.

The Code, as originally passed, continued this mode of procedure in force.

See Secs. 3443, 3445 and 3419, Political Code, as passed in 1872.

All this was changed by the amendments of the Political Code of 1873, which took effect March 28, 1874.

Under the Political Code, as amended, the applicant filed his application in the Surveyor General's office; it is there filed and numbered, and that application becomes the first or initial step to secure title to swamp and overflowed land, instead of the "survey" as under the old law.

See Am'dts to Code, 1873–4, p. 253;
§ 3443, Political Code.

The term "Survey" is dropped out of the Code, and "Application or location" takes its place. See 3441, Political Code.

A patent issued for land applied for under the Code does not contain the word "survey" at all; the word "location" is used.

Every patent in evidence contains a recital of the fact (as by law it is required to) that by a certificate dated from one to ten days before its issuance made by the Register of the State Land Office (which he was required by law to make) it appeared that full payment had been made to the State for the same.

Patent dated January 18, 1876, was issued upon a certificate of the Register dated January 15, 1876.
Tr., Vol. 2, fol. 22.

Patent dated February 17, 1876, was issued upon a certificate of the Register dated February 10, 1876.
Tr., Vol. 2, fol. 35.

Patent dated September 11, 1876, was issued upon a certificate of the Register dated September 9, 1876.
Tr., Vol. 2, fol. 43.

Patent dated June 15, 1877, was issued upon a certificate of the Register dated June 14, 1877.
Tr., Vol. 2, fol. 52.

Still, the Judge of the Superior Court finds that plaintiffs had "no right, title, interest, claim, demand, "* * * legal or equitable, of, in or to" * * * the lands described in the patents, or any of it, "prior to "the issuance of said patents."

Plaintiffs certainly had some equitable claim at least to the land upon which they had made full payment, and for which they had obtained a certificate of the Register of the State Land Office, that they had made full payment for the land "and that Henry Miller, "Chas. Lux and James C. Crocker, assignees, *are* en- "titled to receive a patent therefor."

Tr., Vol. 2, fols. 22–3.

§ 3521 Political Code, in force when the patents introduced in evidence were issued, reads:

"No patent must issue until after the expiration of "one year from the date of the approval of the survey "or location by the Surveyor General."

When a party has made final payment for State land, or if swamp and overflowed land, has reclaimed it, § 3519 Political Code provides that:

"The Register, upon the surrender of the certificate "of purchase by the person entitled to the same, must "prepare a patent for the land, and send it to the "Governor, together with a certificate that the laws "in relation thereto have been complied with, that "payment in full has been made," etc.

Every patent in evidence in this case contains such a recital. We copy from one—

Tr., Vol. 2, fols. 43–6:

"WHEREAS, under the provisions of an Act of Con- "gress of the United States, approved the twenty- "eighth day of September, A.D. one thousand eight "hundred and fifty, entitled, 'An Act to enable the "State of Arkansas, and other States, to reclaim "Swamp Land within their limits,' in which Act the "manner of selecting and setting apart Swamp and

" Overflowed Lands is fully set forth; and WHEREAS, the
" Legislature of the State of California has provided
" for the sale and conveyance of said lands by statutes
" enacted from time to time; and, WHEREAS, It appears
" by the certificate of the Register of the State Land
" Office, No. 2162, bearing date September ninth A.D.
" one thousand eight hundred and seventy-six, and
" isued in accordance with the provisions of law, that
" the tracts of Swamp and Overflowed Lands herein-
" after described have been duly and properly surveyed
" in accordance with law; that full payment has been
" made to the State for the same, and that Henry
" Miller and Charles Lux, *assignees of Julius Chester*
" are entitled to receive a patent therefor; said lands
" being situated in Kern County, and described as
" follows, to wit:

" Surveys Nos. 102 and 103, swamp and overflowed
" lands, Kern County, Township No. 30 South, Range
" No. 24 East, Mount Diablo Meredian; Sections Nos.
" 6 and 8. Portions of said Sections are more partic-
" ularly described as follows;

" North half, north half of southwest quarter, north
" half of southeast quarter and southeast quarter of
" southeast quarter of Section six (6); northeast quarter,
" northeast quarter of northwest quarter, and north-
" east quarter of southeast quarter of Section eight
" (8), in township thirty (30) south, range twenty-four
" (24) east, Mount Diablo Meridian; being embraced
" in Swamp Land Surveys Nos. 102 and 103 of Kern
" County, and containing seven hundred and sixty
" (760) acres.

" Now, therefore, all the requirements of the Act of
" Congress, as well as the Acts of the State Legisla-
" ture in relation to swamp and overflowed lands, hav-
" ing been fully complied with, I, William Irwin,
" Governor of the State of California, by virtue of au-
" thority in me vested, have granted, bargained, sold
" and conveyed, and by these presents do grant, bar-
" gain, sell and convey unto Henry Miller and Charles
" Lux, all the above described lands, with the appur-
" tenances thereunto belonging, to have and to hold,
" unto them, the said Henry Miller and Charles Lux,
" their heirs and assigns, forever."

Still, with this recital that the Register of the State Land Office made a certificate on the 9th of September, 1876, reciting the facts that Miller & Lux had made full payment for the land; that all the laws relating to such sale had been complied with; i. e., that an application had been filed for the land, which had been approved more than one year, and that payment had been made thereon within fifty days after such approval, and a recital that Miller and Lux claimed a patent as assignees of Julius Chester, and there being also in evidence a deed from Julius Chester to Miller & Lux in evidence, dated May 28, 1870 (recorded June 13, 1874), conveying this very land to them (Tr., Vol. 2, fols. 77–89)—all this appearing, the Court finds that "the plaintiffs had not, prior to the issuance of said "patent, any right, title, interest, claim, demand or "possession, legal or equitable, of, in or to said land "or any part thereof."

Again, Julius Chester, on the 28th day of May, 1870, conveyed the land described in this patent to Miller & Lux. If he held a certificate of purchase at that time, he could by his deed pass his interest. His deed would be effectual for such purpose.

Act March 28, 1868, § 69;
Acts 1867–8, p. 528.

Before his application was approved and payment made, he had no rights he could convey.

Cadierque v. *Duran,* 49 Cal., 356.

This claim of appellants that the title acqired by the patents in evidence relate back at least ten months before their respective dates, is noticed by counsel for respondent on the last page (275) of the first part of their brief, which is signed by respondents' counsel and attorneys.

They say:

"As to the claim that without the certificate of pur-
" chase the title by patent relates back ten months be-
" fore the date of the patent, it is disposed of by the
" case of *Osgood* v. *El Dorado Company*, and even
" without the aid of the principles there applied, is
" untenable."

How our claim is answered or disposed of by the case of *Osgood* v. *El Dorado Company*, we fail to see.

In that case it affirmatively appeared that at the time the plaintiff settled and filed upon the land, it had not been surveyed, and therefore his entry and filing were invalid.

And the Court say:

"On this showing, the plaintiff seeks to invoke the
" doctrine of relation; but, for obvious reasons, no
" case was made for the application of that doctrine
" (*Megerle* v. *Ashe*, 33 Cal., 74; *Daniels* v. *Lansdale*, 43
" id., 41; *Smith* v. *Athern*, 34 id., 506; *Lansdale* v.
" *Daniels*, 10 Otto (U. S.), 118.")

Osgood v. *El Dorado, etc., Co.*, 56 Cal., 578.

Turning to the four cases referred to by the Court in support of that decision, we find that in

Megerle v. *Ashe*, 33 Cal., 74,

it was held that the party who invoked the doctrine of relation failed because it appeared that when he filed his declaratory statement as a a pre-emptor, the plat of the survey had not been filed in the Land Office and approved by the Surveyor General; that is, the land was not subject to location.

In

Daniels v. *Lansdale*, 43 Cal., 41,

And the same case,

Lansdale v. *Daniels*, 10 Otto, 118,

it appeared affirmatively that the party filed his claim before the survey and approval.

The Supreme Court say:

"Beyond question, the declaratory statement of the "defendant *was a nullity*, as it was filed at a time "when the Act of Congress gave it no effect."

(P. 118.)

In

Smith v. *Athern*, 34 Cal., 506,

the location was made on unsurveyed land, and therefore void.

The land described in the amended complaint was all swamp and overflowed land. It belonged to the State of California, and had belonged to the State ever since September 28, 1850, the Arkansas Act being a grant in *præsenti*.

In a case reported in 93 U. S. Rep., the Court say:

"This Court has decided more than once, that the "swamp land act was a grant *in præenti*, by which the "title to those lands passed at once to the State in "which they lay, except as to the States admitted to "the Union after its passage. The patent therefore, "which is the evidence that the lands contained in it "had been identified as swamp lands under that act, "relates back and gives certainty to the title of the "date of the grant."

French v. *Fyan*, 93 U. S., 170.

In fact, it is found in this case that—

"Said lands had become and were on said 28th day "of September, 1850, swamp and overflowed lands, "and as such were granted to the State of California "by Act of Congress approved September 28th, 1850."

(79th Finding, Tr., Vol. 1, fol. 463.)

This being so, the land belonging to the State of California, no Act of Congress passed after the title passed to the State could affect the land in any manner.

In support of this, if authorities are necessary, we refer to the cases cited on page 429 of our points and authorities.

And we add to the cases there referred to the following, where the point arose again in the United States Supreme Court, and the Court say:

"The sixth plea, after setting up all the matter "alleged in the second, and also that by the ordinance "of 1787 and the subsequent legislation of Congress, "the navigable streams of that Territory were to be "forever preserved as free highways, then avers that "the land of the plaintiff came to him through a reser- "vation in an Indian treaty in favor of one Therese "Pacquett, who received a patent from the United "States in 1849. It is alleged that this title came to "the plaintiff burdened with an easement in favor of "improving the navigation of the Fox River, which "authorized the injuries complained of, and of which, "therefore, he could not complain.

"*We do not think it necessary to consume time in prov-* "*ing that when the United States sells land, by treaty or* "*otherwise, and parts with the fee by patent without reser-* "*vations, it retains no right to take that land for public* "*use without just compensation, nor does it confer such a* "*right on the State within which it lies;* AND THAT THE "ABSOLUTE OWNERSHIP AND RIGHT OF PRIVATE PROPERTY "IN SUCH LAND IS NOT VARIED BY THE FACT THAT IT BOR- "DERS ON A NAVIGABLE STREAM."

Pummelly v. *Green Bay Co.*, 13 Wall, 182.

And we refer also to the case of

Van Sickles v. *Haines*, 7 Nev., 280,

where the point was made and decided. It was claimed in that case that the Act of Congress of July 26, 1866, relating to water rights on public lands, controlled a patent issued prior to its passage.

"Doubtless, all patents issued or titles acquired from "the United States since July, 1866, are obtained sub- "ject to the rights existing at the time; but this is a "different case—*for if the appellant has any right to the* "*water, he acquired it by the patent issued to him two* "*years before that time, and with which, therefore, Con-* "*gress could not interfere.*

The right is recognized and saved to riparian proprietors by the Act of Congress of May 18, 1796, Sec. 2476, Revised Statutes, which reads:

"All navigable rivers, within the territory occupied "by the public lands, shall remain and be deemed "public highways; and, in all cases where the oppo- "site banks of any stream not navigable, belonging to "different persons, the stream and the bed thereof "shall become common to both."

The Supreme Court of the United States, referring to this Act, says:

"***Viewed in the light of these considera-*** "***tions, the Court does not hesitate to de-*** "***cide, that Congress, in making a distinc-*** "***tion between streams navigable and those*** "***not navigable, intended to provide that the*** "***common law rules of riparian ownership*** "***should apply to lands bordering on the lat-*** "***ter,*** but that the title to lands bordering on navigable streams should stop at the stream, and that all "such streams should be deemed to be, and remain "public highways."

Railroad v. *Schurmeir*, 7 Wall., 288–9;

Roos v. *Faust*, 54 Ind., 471;

Union M. & M. Co. v. *Ferris*, 2 Saw., 179–80.

In this case no attempt was made to show that any single step taken by plaintiffs to acquire title to the land was irregular, much less void.

The certificates of purchase were regular on their face, and *prima facie* evidence of title. No objection was made to their introduction in evidence on the ground that they were in form or substance defective, nor that any steps taken by the applicant to obtain such certificates was irregular.

We submit that the Osgood case has no application here.

Counsel for respondent also state that even without the aid of the principles applicable to the Osgood case, that our claim that the title acquired by our patents related back at least ten months "is untenable."

Why or on what principle or authority we are not told. And we can think of no reason, unless it be that the doctrine announced in the numerous cases decided by the Supreme Court of the United States and the Supreme Court of this State, holding that a patent when issued is evidence that all preceding steps resulting in such patent have been regularly performed, and that "*upon all matters of fact* and law *essential to authorize its issuance, it imparts absolute verity,*" is inapplicable to the "climatic and physical conditions of this State," and to the wants and necessities of certain claimants of large tracts of desert lands in Kern County.

Plaintiffs claim title to 7,240 acres of the land described in the amended complaint under an Act of the Legislature of the State of California, approved March 20, 1878, and a decree entered in the Twelfth District Court in the case of *People* v. *Center*, a case that this Court is familiar with, having recently affirmed the judgment of the Twelfth District Court, which awarded to plaintiffs in this case and others the lands they were in possession of and had paid taxes upon.

As to these 7,240 acres of land, the second finding finds:

"That the plaintiffs had not, prior to the filing of "said decree (in People v. Center), any right, title, "interest, claim, demand or possession, legal or equi- "table, of, in or to said land, or any part thereof."

Tr., Vol. 1, fol. 350.

This decree was filed September 17, 1878.

The decree in that case was obtained under an Act of the Legislature of California, approved March 20, 1878, which required an answer to be filed within sixty days, or on or before the 19th day of May, 1878.

Under the Act of March 20, 1878, the party who claimed the benefit of such Act was required to *set up in his answer and prove* that he was a claimant under a patent for the land issued by the State of California in November, 1867; that he had paid State and County taxes on the land, and had expended reclaiming it in improvements placed upon it at least $1.00 per acre with the amount paid for taxes, and that all such payments had been made subsequent to November 11, 1867.

The decree which is in evidence recites that all such facts were proven, and that plaintiffs had paid taxes on the land amounting to $1,734.02, and that they had expended for reclaiming and permanent improvements thereon the sum of $38,060.

Still, as to this land, the Court finds that plaintiffs had no right, title, interest, claim, demand or possession, legal or equitable, prior to September 17, 1878.

Counsel have never thought proper to attempt to defend this part of the second finding.

We refer your Honors to our Points and Authorities, pages 105–6 and pages 423–4, where we fully

present the facts and authorities in support of our contention, that this portion of finding No. 2 is contrary to the evidence.

THE COURT FURTHER FINDS BY THE 2D FINDING THAT PLAINTIFFS HAD NO POSSESSION OF ANY OF THE LAND DESCRIBED IN THE AMENDED COMPLAINT PRIOR TO THE ISSUANCE OF THE STATE PATENTS AND THE ENTRY OF THE DECREE IN PEOPLE V. CENTER.

How do counsel for respondents meet our objection to this portion of the same finding two (2), that finds that plaintiffs had no possession of the land prior to the issuance of the patents for such land?

To show that that finding was contrary to the evidence, we, in our points and authorities filed herein, referred to the testimony of Mr. Crocker, where he says he used the land for raising cattle, ever after 1870.

To the testimony of Mr. Epperly, who says he rented a portion of the land from Mr. Crocker from May, 1871, to May, 1876, and used it raising hogs.

To the testimony of defendants' witness, McFarland, who saw plaintiffs' cattle on the swamp and overflowed land in the spring of 1875.

Your Honors will see how this objection is met by turning to respondents' brief, pp. 27–39.

We submit that all the evidence referred to on these pages, even if it read in the transcript the same as copied into such brief, would not come up to the promise of counsel, to at least put in sufficient evidence *to merely* support the finding.

But we refer your Honors to pages 2 to 6 of our brief in reply, where will be found the evidence referred to by counsel for respondent in support of this

finding, and also to the evidence as it actually read in the transcript.

We also refer your Honors to our points and authorities, pages 13 to 26, and our brief in reply, pages 32–55, for our points and authorities and the evidence in support of our objection that the second finding is not supported by the evidence, in so far as it finds that plaintiffs had no possession of the land in suit prior to the issuance of the State patents.

Do counsel meet and answer our objection to this finding, even to the limited extent they shall be content to do, "by sufficient (evidence), merely to sup-"port the finding?"

Respondents' Brief, Part I, p. 19.

In support of this finding, in so far as it finds that plaintiffs had no title to the land for which they introduced patents from the State of California, counsel content themselves by referring to the amended complaint and quoting its recital as to title, and then volunteer the following statement:

"There is not a scintilla of evidence tending to "show any title, legal or equitable, in plaintiff, to any "of said lands prior to the issuance of the patents in "the one case, or the filing of the decree in the other, "nor did plaintiffs make out or establish any interest "in or claim to any of said lands at any time prior "thereto."

Does the statement of counsel, unsupported as it is by evidence, dispose of the points we have made and also of the evidence we have called the attention of the Court to in support of them?

1. That the title acquired by the patents introduced in evidence relate back at least one year from the date they were issued.

2. That it appears upon the face of the patents that certificates were issued by the Register of the State Land Office of California (under § 3519 of the Political Code), showing that plaintiffs had made full payment for the land, and had complied with all the provisions of the law relating to the sale of swamp and overflowed land from one to ten days before the patents were issued.

3. That by a deed, dated May 28, 1870, Julius Chester conveyed to plaintiffs some of the very land described in a patent in which he is referred to as the assignor of the plaintiffs, to whom the patent runs.

Tr., Vol. 2, fol. 44.

4. That Mr. Crocker, one of the plaintiffs, went into possession under the deed of May 28, 1870.

Tr., Vol. 2, fols. 2382–3, and fols. 714–15.

That he has been engaged in raising cattle on the land ever since 1879, and has been there more or less the most of his time since then.

Tr., Vol. 2, fols. 488–9.

5. That by deeds, dated July 26, 1872 (Tr., Vol. 2, fol. 60), and October 28, 1875 (Tr., Vol. 2, fol. 68), Henry Miller and Charles Lux conveyed to plaintiff, James C. Crocker, an undivided one-third of a portion of the land described in the amended complaint.

We submit that this statement of counsel, unsupported by any evidence, does not overcome the presumption that arises from the issuance of a patent, that all the steps necessary to the issuance of such a patent have been regularly taken.

Nor the presumption that official duty has been regularly performed, nor the presumption that "a person is the owner of property from exercising acts of ownership over it."

Nor will such a statement do away with the effect of the numerous deeds to plaintiff, which we offered in evidence, which give them at least a claim to the land. The deeds are regular on their face and give the plaintiffs color of title.

In support of our objections urged to this finding on the question of title, we refer your Honors to our

Points and Authorities, pages 103 to 106;
Brief in Reply, pages 18–27.

And on the question of possession we refer to our

Points and Authorities, pp. 13–26;
Brief in Reply, pp. 32–55.

III.

THE THIRD QUESTION SUGGESTED BY THIS COURT, WHICH IT DESIRED COUNSEL TO ADDRESS THEMSELVES, SHOULD BE CONSIDERED UNDER TWO HEADS.

(a) ARE THE FACTS FOUND IN FINDINGS 63 AND 64, OR IN EITHER OF THEM SUFFICIENT TO JUSTIFY A DENIAL OF THE EQUITABLE RELIEF PRAYED BY PLAINTIFFS?

(b) ARE THE FACTS FOUND IN FINDINGS 67, 68 AND 69, OR IN ANY OF THEM, SUFFICIENT TO JUSTIFY A DENIAL OF THE EQUITABLE RELIEF PRAYED BY PLAINTIEFS?

(a) If the facts found by findings 63 and 64 are sufficient to justify a denial of the equitable relief prayed for by plaintiffs it is because they are sufficient to operate as an estoppel in pais.

And we respectfully submit that the facts thus found do not come within any authority that can be found in the books as to what is required to establishing an estoppel *in pais*.

This question we have very fully presented in our former points and authorities and brief.

The findings closely follow the facts set out in the "Third Answer or Defense." We moved to strike out that answer (Tr., Vol. 1, fols. 286–300), on the ground that it was a sham, irrelevant and redundant. The motion was denied, and we excepted to the ruling. The position we took was that the facts set up by such defense were not sufficient, if proven, to establish an estoppel *in pais*.

We have fully presented our views on this ruling, and the authorities in support of them on pages 7–12 of our points and authorities and our brief in reply, part II, pages 237–250.

In the leading opinion in this case on this question of estoppel this Court say:

"Unless plaintiffs were estopped, and the Court "does not find that they were, by reason of their acts "and conduct, while the defendant was constructing "its works for the diversion of the water of Kern "River, from complaining of such diversion, the "findings that the plaintiffs knew of the intention "of the defendant to divert said water before any "was diverted, and of the construction of the works "by defendant for that purpose, but made no objec-"tion to the operations of defendant before the com-"mencement of this action are irrelevannt. The facts "found do not, in our opinion, constitute an estoppel, "and if not, the plaintiffs have the full statutory period "within which to commence their action."

The foregoing is a correct statement of law; it is simply a recognition and reiteration of the rule laid down in the case of

Biddle Boggs v. *Merced M. Co.*, 14 Cal., 279,

governing the application of the doctrine of estoppel *in pais*, with respect to real estate, is the settled law of this State.

In the *Biddle Boggs* case, Chief Justice Field held that to constitute an estoppel *in pais*, with respect to real property it must appear:

First. That the party making the admission by his declaration or conduct, was apprised of the true state of his title.

(2 Pomeroy's Eq. Jur., § 809.)

There is nothing in findings 63 and 64 as to plaintiffs knowing anything about the state of their title.

Second. That he made the admission with the express intent to deceive, or with such careless or culpable negligence as to amount to constructive fraud.

(2 Pomeroy's Eq. Jur., § 811.)

The findings 63 and 64 are silent as to the intention of plaintiffs, and also as to any carelessness or negligence on their part.

Third. That the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge.

(2 Pomeroy's Eq. Jur., § 810.)

The findings 63 and 64 are silent as to the knowledge of defendant, or as to the means of obtaining knowledge; but by other findings it appears that plaintiffs' title was of record, giving the defendants the usual means of acquiring knowledge as to plaintiffs' title.

"It is settled law that standing by in silence will "not bar a man from asserting a title of record in the "public registry or other like office, so long as no act "is done to mislead the other party. There is no duty "to speak in such a case."

Bigelow on Estoppel, p. 502 and Auths.

Sherman on Estoppel, § 427.

Fourth. That he relied solely upon the admission, and will be injured by allowing its truth to be disputed.

(2 Pomeroy's Eq. Jur., § 812.)

The findings 63 and 64 are silent as to reliance of defendants upon acts and admissions or silence of the plaintiffs, and also as to the effect of a denial that defendants relied upon such acts.

Fifth. There must be some degree of turpitude in the conduct of the party before a Court of equity will estop him from the assertion of his title.

(2 Pomeroy's Eq. Jur., §§ 806–7.)

Nothing of the kind appears by the 63d and 64th findings. The facts show that Messrs. Miller & Lux resided 300 miles from the canal of the defendant, and that the other plaintiff, Crocker, knew nothing about it until the fall of 1878, and this action was commenced May 12, 1879.

In the case of

Davis v. *Davis*, 26 Cal., 41,

The Court say:

"It should be remembered that we have a statute "which makes a writing essential to the assignment or "creation of an estate in real property, and that one "of the objects of such statute was to render estates "secure."

This Court, in a recent suit brought to restrain parties from diverting the water of Santa Ana River, quoted with approval the rule laid down in the *Biddle Boggs* case.

The Court say:

"Nor does it appear that there was any fraud, mis- "representation or concealment of any kind practiced "upon the predecessors of the plaintiffs by the "owners of the rancho Santiago. In a recent case, "we had occasion to quote with approval what was "held here in the case of *Biddle Boggs* v. *Merced* "*Mining Company*, 14 Cal., 368: 'There must be "' some degree of turpitude in the conduct of a party "' before a Court of equity will estop him from the

" ' assertion of his title, the effect of the estoppel
" ' being to forfeit his property and transfer its enjoy-
" ' ment to another.' "

Anaheim W. Co. v. *Semi-Tropic W. Co.*, 64 Cal., 195.

The case referred to by Mr. Justice Ross in this last case cited is that of

Stockman v. *Riverside L. & I. Co.*, 64 Cal., 57.

That was an action to quiet title.

The error complained of by appellant was that certain findiugs were not sustained by the evidence.

The Court in its opinion say (pp. 58–9):

" The findings of the Court upon the issues are, with
" one exception, not to be noticed, full, and, in our
" opinion, sustained by the evidence. We would,
" therefore, affirm the judgment and order, but for
" the fact that the defendant in its answer set up own-
" ership in itself of a certain water ditch, referred to
" in the record as the ' upper ditch or canal,' together
" with the right of way therefor through that portion
" of the land described in the complaint, which is
" found and adjudged to be the property of the plain-
" tiffs. On the issue made as to this question, the
" Court below found that the ditch in question was
" completed in 1871 (more than five years before the
" commencement of this action) *at heavy cost, and that*
" *it ' was constructed, maintained and used, including a*
" *' strip fifteen feet wide on each side of the center line*
" *' thereof * * * for the purposes of irrigation*
" *' * * * with the knowledge of the plaintiffs and*
" *' their grantors, and without any objection or opposition*
" *' thereto on their part, and with the active assistance of*
" *' divers of said plaintiffs.' With this finding as its*
" *basis, the Court below adjudged ' that the defendants are*
" *' the owners of, and entitled to the possession of, and*
" *' the right to maintain the upper canal of the Riverside*
" *' Land and Irrigation Company, and to use a strip of*
" *' land fifteen feet wide on each side of the center of said*
" *' canal therefor.'*

" The finding did not determine the ultimate fact in
" issue, and is nor sufficient to sustain that part of the
" decree above quoted. *The learned Judge who tried*

" *the cause and rendered the decree was of the opinion*
" *that the facts found in respect to the ditch constituted*
" *an estoppel in pais;* BUT IN THIS HE WAS IN ERROR.
" The plaintiffs are many in number, and the finding
" that the ditch was constructed, maintained and used
" ' with the active assistance of divers ' of them, is
" obviously too indefinite to apply to any particular
" one or more of the plaintiffs, and it does not purport
" to include them all. It must therefore be laid out
" of consideration. *The only facts, therefore, left on*
" *which the defendant must rely as constituting an estop-*
" *pel are, that the canal cost about fifteen thousand dollars,*
" *and that it was constructed, maintained and used, in-*
" *cluding a strip of land on each side of it, for the pur-*
" *pose of conducting water for irrigation, with the knowl-*
" *edge of the plaintiffs and their grantors, and without*
" *any objection or opposition thereto on their part.*

" *We have been cited to no authority, and know of none,*
" *that holds that the bare fact that the ditch was con-*
" *structed with the knowledge of the plaintiffs and their*
" *grantors, and without objection on their part, though at*
" *heavy cost, is sufficient to operate an estoppel. ' There*
" ' *must be some degree of turpitude in the conduct of a party*
" ' *before a Court of equity will estop him from the asser-*
" ' *tion of his title—the effect of the estoppel being to for-*
" ' *feit his property and transfer its enjoyment to another.*'
" (*Biddle Boggs* v. *Merced Mining Co.*, 14 Cal., 368).

" For the error committed in the particular last
" mentioned, the judgment and order must be re-
" versed."

Can a case be found that is a more complete answer to the claim of respondents' counsel that the facts found in this case by findings Nos. 63 and 64 constitute an estoppel *in pais?* We think not, and this Court, by its decision, as said by Mr. Justice Ross, only followed the settled law of the State.

There is one peculiar feature about finding No. 63:

It finds that the plaintiffs " stood by while the de-
" fendant *from the year* 1875 to the said 12th day of
" May, 1879, continued the construction of said
" canal."

Tr., Vol. 1, p. 109, fol. 433.

While by finding No. 2 it is found that the State owned the land until the patents were issued, the first being issued on the 18th day of January, 1876, "and the " plaintiffs had not, prior to the issuance of said " patents, any right, title, interest, claim, demand or " possession, legal or equitable, of or to said lands or " any part thereof."

Tr., Vol. 1. p. 88, fol. 350.

Yet we have a finding that we are estopped from asserting our rights because we stood by and acquiesced in the construction of a canal upon a river in which we had no interest, and on the bank of which we had no land. This finding includes a period of eight and a half months, or from March 4, 1875, the date the Calloway notice was posted, and the date we are found to have acquired any title or interest in the land bordering on Kern River, and during which we are found to have no title or interest in the land in suit.

This certainly is carrying the doctrine of equitable estoppel a good ways. It not only has the effect of closing a party's mouth as to his acts, deeds and declarations in relation to property he owns, but also in relation to property that he may at any future time acquire. This is not law.

" A purchaser without notice is not affected by any " estoppel *in pais* which may bind his vendor."

Atlantic Mills v. *Mason*, 120 Mass., 249;
Bigelow on Estoppel, 337, and eases.

An estoppel *in pais* only operates upon existing rights. If the party against whom an estoppel *in pais* is claimed has no inierest in the estate at the time he makes the declarations relied on as an estoppel, the fact that he afterwards purchased the estate will not charge it with an estoppel *in pais*.

Atlantic Mills v. *Mason*, 120 Mass., 249;
Bigelow on Estoppel, 471, note;
McDonald v. *Hibner*, 55 Mo., 492.

This Court would surely have to extend the doctrine of estoppel from what it is laid down in any book to hold that the facts found in findings Nos. 63 and 64 constitute an estoppel *in pais*.

2 Pomeroy, Eq. Jur., §§ 807–8–9–10–11–12.

IN THIS CASE THE PLAINTIFFS ARE NOT SEEKING A PRELIMINARY INJUNCTION, BUT THEY PRAY THAT AN INJUNCTION ISSUE AFTER THEY HAVE ESTABLISHED THEIR RIGHT BY A TRIAL.

A very different rule obtains where a plaintiff is seeking a preliminary injunction before he has established his right by a trial, than when a trial has been had and he asks for an injunction after his right has been established, and where an injunction is the proper remedy to secure to him such rights.

In the former case, if the plaintiff has, with knowledge of his rights, acquiesced in the act of the defendant, or has been guilty of laches in the pursuit of his remedy, this will be sufficient to prevent his obtaining a preliminary injunction, his conduct being taken as proof that the danger is not so imminent as to require an interference by the Court before his right is established.

Gould on Water, § 527.

But upon the establishment of his legal rights, and if the injury be not adequately remediable at law, the plaintiff is usually entitled, as of course, to a perpetual injunction.

"Where the plaintiff has made out a strict case of "right he will usually be protected, although the de- "fendant is seriously inconvenienced thereby. So "where the plaintiff was entitled to the flow of a "stream in its natural purity, and the defendants, in "the construction of a system of drainage, turned the "sewage of a large district into the stream, Vice- "Chancellor Wood, in granting an injunction, said: "'There are cases at law in which it has been held

" ' that where the question arises between two portions
" ' of the community, the convenience of one may be
" ' counterbalanced by the inconvenience to the other,
" ' where the latter are far more numerous. But in
" ' the case of an individual claiming certain private
" ' rights, and seeking to have those rights protected
" ' against an infraction of the law, the question is
" ' simply whether he has those rights, and, if so,
" ' whether the Court, looking to the precedents by
" ' which it must be governed in the exercise of its
" ' judicial discretion, can interfere to protect them.
" ' Now, with regard to the question of the plaintiff's
" ' right to an injunction, it appears to me, that so far
" ' as this Court is concerned, it is a matter of almost
" ' absolute indifference whether the decision will
" ' affect a population of 250,000 or a single individual
" ' carrying on a manufactory for his own benefit.
" ' The rights of the plaintiff must be measured pre-
" ' cisely as they have been left by the Legislature.'"

Gould on Water, § 528.

(b) Are all the facts found by findings 67, 68 and 69, or any of them, sufficient to justify the denial of the equitable relief prayed for by the plaintiff?

See our Brief in Reply, Part II, pp. 250–8

Our answer to this second inquiry is five fold.

First. The facts found by findings 67, 68 and 69 are all outside of the issues, and cannot therefore be considered by this Court, and all the evidence introduced to show an appropriation of water by the Kern Valley Water Company was introduced under objection made by plaintiffs' counsel that it was not admissible under the pleadings.

Second. The findings are contrary to the evidence. There is no evidence to support them.

Third. The Kern Valley Water Company is not a party to this suit, and therefore its rights cannot be adjudicated, nor can defendants be permitted to show or rely upon any supposed rights of such company, or of any company or person not a party to the suit.

Fourth. It would be no answer to our bill for defendats to show that others were appropriating the water of Kern River, and if they (defendants) did not take it the other appropriators would.

Fifth. In so far as the 67th finding is concerned, the facts there found would give the plaintiffs an increased flow of water, not a diminished flow.

1.

THE FACTS FOUND BY FINDINGS 67, 68 AND 69 ARE ALL OUTSIDE OF THE ISSUES, AND THEREFORE CANNOT BE CONSIDERED BY THE COURT, BUT MUST BE DISREGADED.

"A finding is useless and idle, unless the facts found "are within the issues, and a judgment based upon "such facts cannot be sustained."

Morenhout v. *Barron*, 42 Cal., 605;
Gregory v. *Nelson*, 41 Cal., 278;
Mondran v. *Goux*, 51 Cal., 151;
Devoe v. *Devoe*, 51 Cal., 545.

"Findings of fact must be within the issues, and if "facts are found without the issues, they will not be "regarded."

Marks v. *Sayward*, 50 Cal., 57.

Not only is the Kern Valley Water Company not a party to this suit, but the defendants evidently left it out intentionally, as it set up in its answer as a special defense the fact that some sixteen different canal companies were appropriating water from Kern River, all of them taking such water from a point on the river below the head of the Calloway Canal. The answer is silent as to the Kern Valley Water Company; it fails in any manner to refer to the company, or in any manner notify plaintiff that they relied upon the fact that the appropriation by such company would be relied upon as a defense.

Without making the Kern Valley Water Company a party to this suit, by a bill in the nature of a cross bill, and then setting up its rights, defendants cannot avail themselves of a defense predicated upon the rights of such company.

Humphreys v. *McCall*, 9 Cal., 59.

[See Mr. McAllister's oral argument, pages 61 to 80, where he fully presents this point.]

All the evidence in any manner relating to the Kern Valley Water Company, or the construction of its canal, or appropriation of water by it, went in under our objection, as did all the evidence as to the rights of two or three other canal companies which were not set up or referred to in defendants' answer.

2.

THE FINDINGS ARE CONTRARY TO THE EVIDENCE. THERE IS NO EVIDENCE TO SUPPORT THEM.

It is not a case of conflict of testimony, but one of no testimony.

In our points and authorities first filed, we called the attention of counsel for respondent to the fact that we should claim that these findings had no evidence to support them, and further, we referred counsel to evidence clearly showing that the findings were contrary to the evidence.

Appellants' Points and Authorities, p. 415.

It then became the duty of counsel for respondent to call the attention of this Court to the evidence which they claimed supported and warranted such finding.

The Court will see how he meets this objection to these findings by turning to page 257, Part I, of their brief, signed by both counsel and attorneys.

We submit that none of the testimony referred to by respondents' counsel tend to support the 68th finding, which finds:

"That, at the head of said canals, and in conjunction therewith, the said Kern Valley Water Company, in 1877, constructed a certain other dam and levee extending completely across the said Buena Vista Swamp, as shown on said map, and thereby completely obstructed and prevented the natural flow of any water into, through, or over said swamp northward of said last mentioned levee, and appropriated and took possession and control of all the waters reaching said levee, and turned the same into the said canals. That the said dam and levee last mentioned are some distance southward from the southernmost part of the said lands of the plaintiffs, and from and after their construction, no water has naturally flowed, or could naturally flow northward beyond the head of said canals, or to or upon the said lands of the plaintiffs, or any part thereof."

Tr,, Vol. 1, p. 111, fols. 442–444.

To meet this reference to the testimony of Wible and McCray, we, in our brief in reply, part I, pages 250–5, set out at length the testimony of Wible and Crocker, the only two witnesses who are examined, as to the effect of the levee and canal upon the flow of the water of Kern River through the lands of plaintiffs.

Their testimony is clear and to the point that every drop of water that entered the canal of the Kern Valley Water Company goes back into Buena Vista Slough, and that it all runs in its accustomed channels through the lands of plaintiffs.

The closing portion of the 68th finding finds that none of the water naturally flows northward beyond the head of said canals, or to or upon the said lands of the plaintiffs or *any part thereof.*

The same finding finds that the canal is only twenty-four miles long. A map is made a part of Finding No. 18, upon which is delineated this canal, and on that

same map is traced the lands of plaintiffs which are situated north of the north end of the canal, or the point where all the water taken into the canal must go back into Buena Vista Slough, if not turned into the slough by some of the numerous gates which both Wible and Crocker say let the water into Buena Vista Slough.

Further, this same map shows that the greater part of the land described in the amended complaint is north of tbe extreme north end of the canal, and near Tulare Lake.

Mr. Crocker is asked:

"Q—Then, turning the water from Buena Vista "Slough into that canal, and running it the length of "it, and letting it run out, would in no manner interfere with the water of Buena Vista Slough, running "through the portion of land described in the complaint that lies close to Tulare Lake?

"A—No, sir.

"Q—It would all have to run through that channel "eventually?

"A—If the water was all turned down that canal it "would make a greater supply of water.

"Q—Why would it make a greater supply of water?

"A—Because there would be less evaporation, and "less loss of water. It would also run in a straight "channel.

"Q—And it would all continue on in the same "Buena Vista channel after it was turned in that it "would if it had run down the natural channel?

"A—Yes, sir. At present the water is turned out "of the canal at the point down about twenty miles.

"Q—How many gates are there in that canal, where "the water can be dropped from the canal, back into "Buena Vista Slough?

"A— Five or six, I should judge. I am not positive; may be more.

"Q—Then, if you should turn the water into that "canal, and let it out at any of these gates, or let it "out at two or three gates, where would it run to?

"A—It would run back into the slough.

"Q—No matter where it was turned out, it would "run back into Buena Vista Slough?

"A—At any point that I know of.

" Q—Is there any other escape for the water by " turning it out of that canal, except into Buena Vista " Slough?
" A—No, sir."

Tr., Vol. 2, fols. 705–8.

Mr. McAllister, in his oral argument, again calls attention to the fact that this finding is not supported by but is contrary to the evidence.

Pages 67–8–9, 75–6–7.

Yet counsel are unable to find any further evidence in support of their finding. Still, the Court finds that after the construction of this canal, no water of Buena Vista Slough flowed to or upon the lands of plaintiffs, *or any part thereof.*

All that Mr. McCray says at fol. 827, Vol. 2, referred to by respondents' counsel, is—

" Q—Now, in point of fact, has there not been con- " structed across Buena Vista Slough a bulkhead of " such a character as that the water instead of follow- " ing its natural course down Buena Vista Slough, " has been diverted into the canal?
" A—Yes, sir.
" That is the fact, isn't it? And that it no longer " flows unobstructed in these natural channels?
" A—Not below the levee."

Counsel, as usual, only give such portions of Mr. Wible's testimony as work to their benefit, leaving out the balance that is directed to the same question at folios 1798–9, referred to by counsel.

Mr. Wible says:

"I superintended the construction of the canal of the " Kern Valley Water Co.
" Q—What effect, if any, has the construction of " those canals in preventing the water from running " down Buena Vista Slough?
" Mr. McAllister. You mean of this Kern Valley " Water Company's Canal?

" Mr. HOUGHTON. Yes, sir.
" The WITNESS. A—Well, I take water out and turn
" it in, just as I see proper.
" Q—*What effect has it upon the escape of the water*
" *down Buena Vista Slough?*
" A—*It don't interfere at all.*
" Q—*Can you take out any water in that canal that does*
" *not eventually go back to the slough?*
" A—*No, sir.*

Tr., Vol. 2, fols. 1798–9.

Then he goes on and locates all the gates that are used to let the water out of the canal, and says no matter at what gate the water runs out, or if it be permitted to run the whole length of the canal, it runs back into Buena Vista Slough.

This testimony does not support or tend to support the 68th finding.

The finding under review (68) finds that since the construction of the levee by the Kern Valley Water Company in the year 1877, " no water has naturally " flowed, or could naturally flow northward, beyond " the head of said canals, or to or upon the said lands " of the plaintiffs, or any part thereof."

By the 75th finding, the Court finds:

" That usually during said irrigation season there is
" ample and abundant water flowing down said river,
" not only to fill the aforementioned canals and ditches
" heading on said river - including that of defendant
" —and furnish and supply to them sufficient water to
" irrigate the lands by them irrigated, as in these find-
" ings stated, but also to flow to said Buena Vista
" Slough, and since the construction of the dam and
" levee at Cole's Crossing, and the turning of the
" waters there, reaching northward, as in these find-
" ings mentioned, to wetup and thoroughly irrigate all
" the lands in Buena Vista Swamp, and supply water
" thereon for all useful and needful purposes."

Tr., Vol. I, fols. 455–6.

Can these two findings stand togother?

Counsel in their attempt to show that the 75th find- is supported by the evidence, say:

"As to the quantity of water, which during the irriga- "tion season of the year, reaches Buena Vista Swamp "since the construction of the artificial obstructions at "Cole's Crossing, and the turning of the water north- "ward from that point, the testimony shows that every "year, except possibly the dry year of 1879, plaintiffs, "notwithstanding the amount diverted by all the ca- "nals along the river, have had not only a sufficiency "of water to wet up their lands, and supply their "wants, but at times, even more than they knew what "to do with. In fact, so much water has come down "that the Kern Valley Water Companys's Canal—a "canal of which the finding says, and plaintiffs do not "deny, is 120 feet wide on the bottom, 140 feet wide "on the top, and 10 feet deep, with a fall of one foot "per mile, having a capacity of carrying more than "1200 cubic feet per second—could not take it all; "for, as we have elsewhere shown, Wible, its superin- "tendent, besought the defendant and others to inter- "cept the waters and prevent them ruining his ca- "nal. Besides, as we have seen (*ante* "Buena Vista "Slough") the swamp has each year since the placing "of the dam at Cole's—1879 alone excepted—been "covered with water from side to side."

Brief of Respondent, Part I, p. 228.

This admission of counsel shows clearly that the construction of the levee across Buena Vista Slough by the Kern Valley Water Company, does not prevent the water of Kern River from naturally flowing down Buena Vista Slough, and through and over plaintifis' lands.

It is found that the canal will carry but 1200 cubic feet of water per second. Kern River, in times of a moderate stream of water, carries 2500 cubic feet of water per second. This appears by the testimony of Colonel Mendell (Tr., Vol. 3, fol. 1028), and counsel for respondent are correct when they say that the canal of the Kern Valley Water Company could not take all of the water coming down Kern River. If

this be so, how is a finding to stand that finds that it does take it all, and that ever since its construction no water has naturally run down Buena Vista Slough.

This is another one of the mysteries connected with this case. We find at a given point a channel well defined carrying a very large stream of water; at a section line, the south line of plaintiffs' lands, it disappears, water and all; but after a break of less than one-eighth of a mile it again appears as large as ever, and with the same stream of flowing water. So, at least, appears by finding 18, and the map which is made a part of it.

So we now are told by finding 68 that the canal of the Kern Valley Water Company, with a capacity of 1200 cubic feet per second, carries all the water of Kern River, or at times more than 2500 cubic feet per second. We observe that the carrying capacity of this canal changes as different findings are being discussed and the exigencies of the case demand.

Again, we are told by counsel:

"If you prohibit the use of all these canals above
" the swamp, if you insist upon the natural common
" law flow of the water, undisturbed and undiminished
" on the swamp, in the light of the evidence in this
" case, as well as by common observation and knowl-
" edge, what is the necessary and inevitable result?
" That in every year, except exceptionally dry years—
" years of drouth—the whole of this swamp land,
" from one margin to the other, and from Buena Vista
" Lake to Tulare Lake, so long as the inlet to Buena
" Vista Lake is stopped up, will be covered over from
" side to side and from end to end with water."

Respondents' Brief, Part II, pp. 40–1.

Another case of Counsel for Respondent *v.* The 68th Finding.

3.

THE KERN VALLEY WATER COMPANY IS NOT A PARTY TO THIS SUIT, AND THEREFORE ITS RIGHTS CANNOT BE ADJUDICATED, NOR CAN DEFENDANTS BE PERMITTED TO SHOW OR RELY UPON ANY SUPPOSED RIGHTS OF SUCH COMPANY, OR OF ANY COMPANY OR PERSON, NOT A PARTY TO THE SUIT.

Humphreys v. *McCaul*, 9 Cal., 59.

4.

IT WOULD BE NO ANSWER TO OUR BILL FOR DEFENDANTS TO SHOW THAT OTHERS WERE APPROPRIATING THE WATER OF KERN RIVER, AND IF THEY (DEFENDANTS) DID NOT TAKE IT THE OTHER APPROPRIATORS WOULD.

The decision of this Court in the case of *Ellis* v. *Tone*, is decisive of that question. That was an action by a riparian proprietor to recover of defendant damages for diverting water from Mormon Slough.

The defendant requested the Court to give the following instruction to the jury. The Court refused and an exception was reserved:

"A riparian proprietor who takes water from a "channel in which it naturally flows, has no legal "right to take it beyond his own land before re- "turning it to its natural channel. So, if the "jury believe from the evidence that the waters "of the Calaveras River and Mormon Channel "would have flowed to the main Mormon Chan- "nel after plaintiffs had built their dams, unless "diverted by said dams or other means, and if the "jury *further believe from the evidence that plaintiffs'* "*dam in the main channel of Mormon Slough was not* "*built on their land for the purpose of irrigation, but on* "*the land of one Murphy, whose land did not adjoin the* "*land of plaintiffs, and unless the jury believe from* "*the evidence that the proprietors of intermediate lands* "*consented to the diversion of said natural water from* "*the main channel of the Mormon Slough by the dam* "*placed therein by plaintiffs (and such consent should be*

"*shown by the evidence), then the jury should find for* "*the defendants.*"

To this the Court say:

"And it is urged that in this there was error, be- "cause plaintiffs did not show the consent of the in- "termediate owners of land referred to in the request. "*As to this, it is only necessary to say that no intermediate* "*land-owner is here objecting to plaintiffs bringing the* "*water through their lands. As they made no objection,* "*we cannot see that the defendants could make the ob-* "*jection for them, or either of them.*"

Ellis v. *Tone*, 58 Cal., pp. 298–9.

So, in this case, no one interested in the Kern Valley Water Company is objecting, and the defendant here cannot make the objection for a third party.

A strong case in support of our position that the defendant cannot avail itself of the right of the Kern Valley Water Company, or defend this action by showing that it may have rights as against plaintiff, is

Waltier v. *Miller*, 11 Oregon, 329.

In that case the Supreme Court of Oregon held:

One who claims a right to dam a stream so as to turn the water back upon the land above him, must show a right so to do by grant, license, or by prescription.

The title of the occupant of the land on which the easement is claimed cannot be inquired into by one who shows no right in himself. He cannot enjoin such drainage of the land as is naturally incident to its ownership.

The Court says, pp. 330–1;

"The only right the appellant claims, is the right "to drain off the surface water standing on his own "land, and such water as may have been turned back "upon it by respondent's dam. So far as the respond- "ent attempts to prevent this, he is attempting to as- "sert an easement in another man's land, for which

" he has never paid a dollar, and to which he asserts
" no manner of title except actual user, which has not
" ripened into a right by prescription. The respond-
" ent has the burden of proof upon him, and has failed
" to make out any right to the relief which he claims.
" Waltier can no more question Miller's title than
" Miller can question Walter's. Miller's possession is
" a good title against Waltier.

"It als appears that Miller has paid his 20 per cent.
" and has a certificate of sale from the State to the
" land as swamp land. This certificate conveys a pres-
" ent interest, for the Act declares that on failure to
" perform subsequent conditions, the land shall revert
" to the State. A right to the possession follows this
" certificate, for the object of the Act is to reclaim the
" swamp land, and to do this possession is necessary.
" Whether this right to the possession has terminated
" or not is a question of law, which Waltier cannot in-
" quire into. He is not in a position to compel swamp
" land claimants to put their rights in issue."

We refer your Honors to our points and authorities, pages 20 and 21, where we first made this point in support of our motion to strike out the separate answer or defence which set up the fact that other canal companies also appropriated water from Kern River, and if defendant had not taken the water which would have run through our land, it would never have reached us, as other canal companies, not parties to this suit, would have appropriated it before it reached our land.

If the position taken by counsel for the respondent is correct, then a riparian proprietor who puts a dam across a watercourse and obstructs the *natural* flow of the water, or if he should construct a canal or ditch that in the least changes the *natural* flow of the water, he could not maintain an action against a party who diverted all of the water in the stream, although the watercourse might run for miles through his land after it had passed the short canal or ditch which changed its natural course.

Again, he could not be a stockholder in a mill that

used the water and successfully prosecute a party who appropriated the whole water of the stream. He would be met with the answer: You authorized the Mill Company to use the water and change its natural flow.

Judge Stanly, in his brief, page 185, says:

"If the riparian owner puts any obstruction in the "stream, or consents to the placing of any such ob- "struction therein by any other person, *with the pur- "pose of thereby diverting the water* from the course of "its natural flow, he destroys not only the continuity "of the stream, *but waives the protection and benefit of "that very law which is the foundation of all his riparian "rights.*"

We submit that such a proposition this Court is not given to listen to with any degree of patience, as the only limitation placed upon the use of water by a riparian proprietor is that he must use it so as not to interfere with the rights of other riparian proprietors on the same stream, and a riparian owner cannot be placed in the position that such a rule would place him. That is, he would not dare to utilize a stream of water flowing through his land by placing any obstruction therein, however small or temporary, or consenting that any one else should do so, because if he did, a stranger could go above him and appropriate all the water in the stream, and defeat any action that might be brought by the riparian owner against him. This would certainly be a very severe penalty to visit upon a person for using his property in such manner as would make it most beneficial to him, and when he did not in any manner interfere with the rights of any other person on the stream either above or below him.

We submit that the correct rule is that laid down by an authority extensively used and quoted from by Judge Stanly in making his argument in this case. It

was the rule in California, under the civil law, and has been recognized and applied under the common law.

The authority we refer to is

Escriche under Title Aqua IV, p. 110.

He says:

"When the water passes through the interior of an "estate, the owner can use it at his pleasure; because "since the banks are his own, he is not bound to look "out for the interest of another riparian proprietor" (referring to an owner on the opposite bank, when the stream was a boundary between them); "but on its "leaving his estate he must restore it to its natural "or ordinary course, and he has not the right to "absorb it entirely, or consume it, or to give it an- "other direction; because it is not his, in respect to "ownership, but only in respect to the use which he "can make of it as it passes.

"*Inasmuch as every riparian proprietor can make use* "*of the water which passes along the border of his estate,* "*to irrigate the same*—IT IS CLEAR THAT HE CAN OPEN "CANALS, DITCHES OR TROUGHS, AND ALSO BUILD A "DYKE, A DAM OR OTHER WORK TO CATCH OR RAISE THE "WATER ON HIS ESTATE, *provided that he does not make* "*it flow back upon the lands above, against the will* "*of the owners thereof, or inundate the fields below,* or "descend in such a way as to cause destruction; nor "may he detain it in such a way that the neighbors "are deprived of their accustomed irrigation."

"RECLAMATION" OF SWAMP AND OVER-FLOWED LANDS, AS UNDERSTOOD BY RE-SPONDENT'S COUNSEL.

Respondents' counsel claim that as plaintiffs acquired title to the land along Buena Vista Slough, under Acts of Congress and of the Legislature of California, which not only recognized the rights of parties to reclaim the land, but that the land was granted to the State that it might be reclaimed, that therefore plaintiffs can have no riparian right in a watercourse that runs through the land.

If this be so, then riparian rights attach to but few rivers and streams in California.

But we do not find in the Act of Congress—Arkansas Act—or in any of the Acts of the Legislature, anything that leads to any such a conclusion or result. This Court has clearly stated what the object and purpose of the Government of the United States was in granting to the State the swamp and overflowed land within its borders.

"The object of the Federal Government in making "this munificent donation to the several States was to "promote the speedy reclamation of the lands, *and thus "invite to them population and settlement, thereby opening "new fields for industry and increasing the general pros-"perity.* That this was the purpose which animated "Congress in making the grant is obvious from the "first section of the Act, which provides 'That to en-"'able the State of Arkansas to construct the neces-"'sary levees and drains to reclaim the swamp and "'overflowed lands therein, the whole of those swamp "'and overflowrd lands, made unfit thereby for cultiva-"'tion, which shall remain unsold at the passage of "'this Act, shall be, and the same are hereby granted "'to said State.'"

Kimball v. *Reclamation Com'rs*, 45 Cal., 360.

The object was to enable the State to make land suitable for cultivation, that was not so at the time the Act of Congress was passed, and not as we are told by counsel for respondent, to change the land from swamp and overflowed to desert land.

Nor has the State of California ever passed an Act looking to the reclamation of swamp and overflowed land that contemplates such a reclamation (?) as would make the land valueless for agricultural purposes, which would be the effect of such "reclamation" as counsel claim is contemplated by the Acts of the Legislature.

Counsel say:

"The State not only authorizes and directs the "reclamation of these lands, but holds out large in-"ducements, to the extent even of giving the land to

" the certificate holder, *who will effect a speedy sever-*
" *ance of the water which theretofore has been wont to*
" *flow upon it from the land over which it squanders*
" *itself.* * * *

" *It not only provides that the owners of a mere ma-*
" *jority of acreage in any one body of swamp land may*
" *sever the so-called easement from the land and deprive*
" *the majority owners, nolens volens, of all flow, use or*
" *benefit of the waters which had theretofore been accus-*
" *tomed to reach them,* but it authorizes others, not
" within the same body of land or having any connec-
" tion therewith, to do the same."

L. T. Haggin's Brief for Respondent on Rehearing, pp. 88–9.

We find nothing in the Act of 1868 or in the Political Code that recognizes the simple taking of all water from swamp and overflowed land as a reclamation of such land under said Acts.

But on the contrary, by reclamation is meant making land not suitable for cultivation, so that it can be successfully cultivated.

That is managing and controlling the waters that cause the overflow so as to reclaim the land, and " invite to them population and settlement, thereby " opening new fields for industry and increasing the " general prosperity" (45 Cal., 360). Not removing all the water and making the land desert and utterly valueless to support life, or raise a crop.

This would be anything but a reclamation of swamp and overflowed land. In its natural state it can be put to some beneficial uses. In its improved (?) or reclaimed state it would be valueless for any purpose.

Mr. Clarke tells us what would be the effect of such a " reclamation," as counsel claim is contemplated by the Act of 1868, and the Political Code.

He says, speaking of the body of swamp and overflowed land along Buena Vista Slough:

" Q—Do you consider that land good agricultural
" land, running down through there, the most of it?

A—Provided it was reclaimed and fixed so as to "handle, and use the water for it I think it would be "as fine land as there is in the country. The way it "is, of course, is it not.

"Q—When the spring freshets of the river come on "this tract of land in an ordinary season, and the "water recedes to the channel of Buena Vista Slough, "what proportion of the land can be travelled over by "man or beast? What proportion of this swamp "land around the lake and Buena Vista Slough?

"A—I should judge, ordinarily, all of it; three-"quarters of it.

"*Q—If no water should run through Buena Vista "Slough over this land for two or three years, what would "be the effect of it on the land?*

"*A—Well, it would be perfectly worthless land to "purchase at all*, with the exception of a wet year, "or something like that. Of course rain will pro-"duce as well as water and would have the same effect."

Tr., Vol. 2, pp. 294–5, fols. 1178–1180.

Here we have the testimony of an experienced farmer and cattle raiser, one who knows what he is talking about, a man who has by actual experience learned what reclamation of swamp and overflowed lands means, and he gives the only correct statement that can be given as to what is meant by the reclamation of swamp and overflowed land. That is, "reclaimed and fixed so as to handle and use the water for it," and that is just what Mr. Wible and Mr. Crocker say they did by constructing the works of the Kern Valley Water Company, works commenced by Swamp Land District No. 121 in its undertaking to *reclaim* the land, and completed by the Kern Valley Water Company, a corporation organized by the swamp land owners on Buena Vista Slough.

Another claim advanced by counsel in this connection is quite novel:

That as the owners of swamp land in a given district may take all the water from such district in an effort to

reclaim such land, even against the wish of other land owners in the same district, that any one is justified in depriving such swamp and overflowed land of all the water that runs through it.

Counsel say:

"Now, the land owners in the Kern and Buena "Vista Lakes tract may divert the waters from their "lands when and as they see fit. They may, if "deemed expedient, go to the head of the Calloway "Canal, and there intercept the waters of the river "and turn them off towards Tulare Lake, away from "the lands in Buena Vista Swamp; yet the land "owners in Buena Vista Swamp cannot complain, for "they hold their own lands under the same title, and "know that they are ever subject to both voluntary "and involuntary reclamation, and liable at any "moment to be deprived of all water by some reclama-"tion scheme above.

"*Now, if the one swamp land owner cannot com-"plain of this diversion by another swamp land owner, "upon what principle of law and equity can he com-"plain of the same thing when done by a third party?*

"If his right to have the water there be not in it-"self an absolute right against all the world, what "is there in the right to permit of its assertion against "one person, but not against another? Certainly the "diversion above is not the exercise of any riparian "right common to all proprietors along the stream. "If his right be the riparian right, it exists solely by "reason of a policy of the law which inseparably at-"taches the water to the land. But if that policy di-"rects or permits a severing of the water from the "land, it can make no difference by whom the sever-"ance is done."

Mr. L. T. Haggin's Brief for Respondent on Rehearing, pp. 89-90.

This doctrine has the merit of originality at least; what other it possesses we fail to see.

If the right conferred upon owners in swamp land districts be universal, and may be asserted by any citizen of the State, whether he owned land in the

swamp land district or not, why are not all other rights created by statute for the benefit of a certain class also universal, and cannot any one assert such right, and when the party attacked sets up as a defense the fact that the plaintiff has no interest in the matter, will he not be met with the answer: "Well, you are "subject to a suit any way, and what difference does "it make to you whether I sue you or some one else "does?"

Again, a tenant in common may maintain a suit against his co-tenant, and in such suit have all necessary roads laid out through the land sought to be divided.

So where two persons owning adjoining lands, one of them may compel the other to pay for one-half of the expense of erecting and maintaining a division fence.

If a co-tenant can compel the division of land and ing out of roads, or an adjoining owner the erection and maintenance of a dividing fence, then, using the language of the attorney for respondent (pages 89–90, Brief of L. T. Haggin on Rehearing), "upon what principle of law or eqnity" can the other co-tenant or the adjoining owner complain if the same thing is done by a third party? "If his right to hold his land be not "in itself an absolute right against all the world, what "is there in the right to permit of its assertion against "one person, but not against another?"

In other words, if one party have a claim or cause of action against another, arising either under a statute or contract, why should not any third person assert the claim or maintain the action? for it can make no difference to the party against whom the suit can be maintained, or against whom the claim is held, who institutes the suit or asserts the claim against him.

It is true that this would conflict with the provision of Section 367 of the Code of Civil Procedure, which

requires suits to be presented by the real party in interest, but then that section should not stand in the way of such universal litigation.

We refer your Honors also to our brief in reply, part II, pp. 130–143, where we have discussed this point very fully.

BUENA VISTA SLOUGH FOR A DISTANCE OF ABOUT TEN MILES SOUTH OF WHERE IT ENTERS TULARE LAKE, OR FROM THE LINE DIVIDING TPS. 26 AND 27 S.

We desire to call your Honor's special attention to the manner in which counsel for respondents have always evaded one point we have made in every brief filed, in relation to this channel known as Buena Vista Slough being, for miles south of Tulare Lake, a well-defined channel.

Counsel have not attempted to refer to any testimony to the contrary; and the witnesses of both plaintiffs and defendant testified fully to finding such a channel and following it, and all this we pointed out in our briefs first filed.

Your Honors will find four findings as to this watercourse through the Buena Vista Slough swamp and overflowed land: Numbers 3, 18, 71 and 72.

Findings 18 and 71 both refer to Exhibit "A," annexed to the findings, as showing Buena Vista Slough, so far as there is any channel, and the Court finds that map is correct.

Now on this map there is no trace of a channel below Section 24, T. 29 S., R. 23 E., or the Bonestell House.

By examining Exhibit "A," annexed to the findings, upon which the Court finds that the land described in the amended complaint is correctly delineated (finding 3), your Honors will see that the two tracts of

land described in the amended complaint are separated by the township in which is situated Goose Lake; after this break of six miles the tract north of Goose Lake continues for some ten miles, and for seven of the ten miles the plaintiffs own all the swamp and overflowed land along Buena Vista Slough.

On pages ~~280-8~~ 282-289, part I, of our brief in reply, we have called attention to the evidence of a great number of witnesses, all called by defendants, who testified that there is a well-defined channel, in fact two of them (east and west) all through this most northerly tract of plaintiffs' lands.

This, counsel have never attempted to answer. They on their oral argument, rely upon this Exhibit "A," and point out the breaks that are found in the channel or in Sec. 15, T. 30 S., R. 24 E.

Still, they do not tell your Honors where the evidence can be found to support a finding which finds the channels of this slough "are correctly and fully shown and delineated" upon a map which has not a single indication of a channel for a distance of eight or ten miles, where their own witnesses testified that it existed and that it was well-defined.

There was a well-defined channel through the center of a tract of plaintiffs' lands, containing over thirty-nine thousand acres; and had we utterly failed to show that there was a channel at any point from where Kern River enters Buena Vista Slough until it passed Goose Lake, that for thirty miles the water of Kern River simply supplies a swamp with water, still, as that swamp supplied water to a channel which ran through this tract of thirty-nine thousand acres of land described in the amended complaint, the plaintiffs must recover in this action.

We refer your Honors to the diagram, and which is annexed to our brief in reply, which we had photo-

graphed, showing the crossings made by respondents' witnesses (and its correctness has never been questioned). You will see upon an inspection of that diagram that a crossing was made just north of the south line of plaintiffs' lands which lay between Goose Lake and Tulare Lake, across Sections 31 and 32 in Tp. 26 S., R. 22 E, and that but two crossings were made below or north of that point, and the witness of defendant who made these crossings testified that at such crossing a large watercourse or channel was found.

On pages 259 to 265 Part I, of our brief in reply, we have described this photographic map and referred to the evidence in support of its correctness.

There can be but one way to account for counsel's silence as to this finding that Exhibit "A," "correctly and fully" shows the channels and sloughs through this body of swamp land, and that is their inability to find any evidence in support of it in the record.

FINDINGS HAVING NO EVIDENCE TO SUPPORT THEM, AND AS TO WHICH RESPONDENTS HAVE NOT REFERRED THIS COURT TO ANY EVIDENCE IN SUPPORT OF THEM.

The following findings we in our assignments of error and points and authorities claimed, were not supported by the evidence, but are contrary thereto, and counsel for respondent content themselves by saying:

> "The objections of plaintiffs to the other findings
> "were made, we think, more in a spirit of contention
> "than as possessing any real worth or intrinsic merit.
> "We shall therefore pass over them as briefly as pos-
> "possible."
>
> Respondents' Brief, Part I, p. 240.

This is certainly a convenient if not an effective way of disposing of an error assigned by us, and in our points and authorities relied upon to reverse the judgment in this case.

79TH FINDING.

On page 262-3, Vol. 5, Tr., will be found the following assignment of error.

"Sixty-third. The evidence is insufficient to sustain or justify the finding (79):

"That from the overflow in these findings mentioned, the water which has reached Buena Vista Swamp has, until obstructed by the works of the Kern Valley Water Company, in findings 71 and 72 mentioned, flowed to the uppermost or southern body of plaintiffs' said land, and extended northward over said swamp to a greater or less distance towards Tulare Lake, according to the fall of rain and snow, and without any regularity or certainty; but for more than ten (10) years next preceding the commmencement of this action, none of said water has flowed to Tulare Lake, save and except in the exceptional and rarely recurring years of excessive and unusual rain and snow a portion of said water has flowed to and into said Tulare Lake, following, however, no defined channel over said swamp, but generally spreading throughout the same, and not constituting a watercourse or regular flowing stream. That the waters which from said overflows reach said swamp, except such surplus portion thereof as passes to Tulare Lake, remain on said swamp for a great length of time. That the overflows and the seepage and percolation in these findings mentioned, did, prior to September 28th, 1850, cause said lands within said swamp to be swamp and overflowed lands, and said lands had become and were on said twenty-eighth day of September, 1850, swamp and overflowed lands, and as such were granted to the State of California by Act of Congress, approved September 28th, 1850—in this:

"It appears by the evidence that the flow of the waters of Kern River down through Buena Vista Slough and through the body of lands in the amended complaint and in these findings described, is regular and certain; that within the past ten years the waters of Kern River have flowed through the sloughs and channels running through said lands and into Tulare Lake; and that such flow of said waters to Tulare Lake has been annual, except when the waters of Kern River have been diverted into the canals higher up the river; that the said

" waters have flowed to and into Talare Lake, follow-
" ing a defined channel or channels through said swamp
" land, which has constituted a watercourse and regu-
" larily flowing stream through said swamp land; that
" the regular flow of the waters of Kern River through
" the channels running through said body of swamp
" land prior to September 28th, 1850, caused said
" lands to become swamp and overflowed lands, and
" that said lands were not caused to be swamp and
" overflowed by seepage and percolation."

In our points and authorities we have devoted ten pages (pages 387 to 396) to pointing out evidence clearly showing that this finding is contrary to the evidence, that it is contrary to reason, and that it is a physical impossibility for the facts found to be true.

How do counsel for respondent dispose of our objection?

By turning to page 237 of Part I of their brief, your Honors will see how counsel, in a half a page, dispose of our objections to some twenty findings. We copy the few lines by which counsel would clear the record of so many of our objections and assignments of error:

" Having now shown that from the Calloway head-
" gate to the swamp there is no continuous stream or
" watercourse; that between the point of defendants'
" diversion and plaintiffs' lands the waters of Kern
" River, in their natural, usual and accustomed flow,
" flow away from instead of towards those lands; that
" the flow of water at the one point can in no manner
" be identified with the flow of water at the other;
" that to, through, over or upon these lands of plain-
" tiffs, there is no watercourse or defined stream, no
" usual flow, no continuous channel—'nothing that
" ' the most prejudiced or skeptical could construe as
" ' a channel'—we have, we think, destroyed the
" whole of plaintiffs' case. For, even were there no
" evidence whatever in support of the other findings,
" the testimony above recited amply justifies all those
" findings and parts of findings—especially findings
" Nos. 3, 4, 5, 7, 8, 9, 11, 12, 13, 14, 16, 17, 18, 30, 31,
" 40, 45, 46, 47, 48, 49, 65, 66, 70, 71, 72, 78 and 79—

" which in any manner relate to Buena Vista Slough, " or to the swamp, the flow of water, 'watercourses,' " channels or depressions therein."

By turning to pages 105–6 of respondents' brief, your Honors will see that all the evidence that is referred to on page 237 is in support of finding 71. That is, in support of a finding that finds that there is no watercourse through the body of the swamp land except down to Sec. 24, T. 29 S., R. 23 E. The evidence is all addressed to that single finding. The evidence in no manner tends to show what the flow of water down Buena Vista Slough has been for the ten years preceding the commencement of this action. We refer to the testimony showing the flow, year by year, and in no brief filed by any of respondents' numerous counsel, or by their attorneys, do they even refer to this finding or notice our attack upon it.

On page 39 of the brief they include this finding, when they refer to the specifications of insufficiency to some fifty-four findings, and promise that after answering the substance of our objections, they will refer more specifically to the several findings. This promise is not kept, for this finding is not thereafter in any manner referred to by counsel for respondent.

We refer your Honors to our brief in reply, part I, pages 353–357, where we again make the point that this finding is contrary to all the evidence, but also that it is in conflict with and contradicted by several of the other findings.

7TH FINDING.

On page 396 of our points and authorities, and page 352, part I, of our brief in reply, we call attention to our specification of insufficiency, that the seventh finding is not supported by the evidence.

Counsel for respondent do not attempt to point out any evidence to support the finding.

9TH FINDING.

On pages 396–7 of our points and authorities, and page 352 of our brief in reply, the same as to the ninth finding.

No response from counsel for respondent.

33D FINDING.

On page 405 of our points and authorities, and page 352 of our brief in reply, the same as to finding thirty-three.

No response from counsel for respondent.

34TH FINDING.

On page 405 of our points and authorities, and page 352 of our brief in reply, the same as to the thirty-fourth finding.

No response from counsel for respondent.

37TH FINDING.

On page 407 of our points and authorities, and page 352 of our brief in reply, the same as to the thirty-seventh finding:

And on page 358 of our brief in reply, we again call special attention to this finding and we request your Honor's careful consideration of this finding that overturns the laws of nature, and gives the lie to the experience and observation of every man, woman and child who have ever resided within sight of Mount Whitney.

No response from counsel for respondent.

40TH FINDING.

On page 407 of our points and authorities and page 353 of our brief in reply, the same as to the fortieth finding.

No response from counsel for respondent.

62D FINDING.

On page 413 of our points and authorities and page 353 of our brief in reply, the same as to the sixty-second finding.

No response from counsel for respondent.

73D AND 74TH FINDINGS.

On pages 416–17 of our points and authorities, and page 352 of our brief in reply, the same as to the seventy-third and seventy-fourth findings.

No response from counsel for respondent.

75TH FINDING.

On pages 417–18–19 of our points and authorities, and 353 of our brief in reply, the same as to the seventy-fifth finding.

On page 258 of Part I of respondents' brief, they do devote a few lines to this finding. We copy all that they insert to show that this finding is supported by the evidence:

"In support of finding 75, as to Kern River not "being a perennial stream, we refer to the testimony "of Canfield, who says that during the years 1871, "'72, '73 and '74, he crossed the river a great many "times when there was no water running in the river "at Tracy's Crossing (Tr., Vol. 2, fol. 1211), and of Wil- "kenson, who says: 'My observation is that when- "'ever crossing the river in the fall part of the year "'down at this place, Tracy's Crossing, there was no "'water—that is, late in the fall. That was my ob- "'servation. I was in the habit of going down "'hunting and fishing during the years 1873, '74, '75 "'and '76.'"

Tr., Vol. 3, fol. 323.

The finding (75) reads:

"That Kern River is not, throughout its whole "course down to Buena Vista and Kern Lakes, a per- "ennial stream, nor during the period of its flow are "the waters therein flowing uniform or constant in "amount and volume, but the volume and amount of

" said waters vary and are subject to great and sudden " fluctuations; that generally the irrigation season " along Kern River is from February to July; that " usually during said irrigation season there is ample " and abundant water flowing down said river, not " only to fill the aforementioned canals and ditches " heading on said river, including that of defendant, " and furnish and supply to them sufficient water to " irrigate the lands by them irrigated, as in these find- " ings stated, but also to flow to said Buena Vista " Slough; and since the construction of the dam and " levee at Cole's Crossing, and the turning of the " waters there reaching northwards, as in these find- " ings mentioned, to wet up and thoroughly irrigate " all the lands in Buena Vista Swamp, and supply " water thereon for all useful and needful purposes."

Tr., Vol. 1, fols. 454–6.

Our specifications of insufficiency are three in number.

" *(a)* It appears by the evidence that Kern River " is, throughout its whole course down to Buena Vista " Slough, a perennial stream.

" *(b)* And it appears by the evidence that the vol- " ume or amount of water running in Kern River " from February to July of each year, and during " what is styled in said 75th finding the irrigating " season, is not sufficient to fill the canals and ditches " heading on said river, including that of the defend- " ant, and to furnish and to supply them sufficient " water to irrigate the lands by them irrigated, as in " said findings stated, and also to flow to said Buena " Vista Slough.

" *(c)* And it appears by the evidence that, since " the construction of the dam and levee at Cole's Cross- " ing, sufficient water has not run down through Kern " River and Buena Vista Slough to wet up and thor- " oughly irrigate all the lands of plaintiffs, and sup- " ply water thereon for all useful and needful pur- " poses."

Tr., Vol. 5, fols. 1033–35.

All the evidence referred to by counsel for respondent on page 258 of their brief, is to meet our first specification of insufficiency. The statement of counsel following cannot take the place of evidence, nor is

it any answer to the second and third specifications of insufficiency.

FINDINGS THAT ARE CONTRADICTORY.

The first and second findings are contradictory.

By the first finding it is found:

1. That on the 18th day of January, 1876, there was granted to the plaintiffs, Miller, Lux and Crocker, by letters patent, by the State of California, a certain portion of the lands described in the amended complaint.

2. That on the 17th day of February, 1876, the same as to other land described in the amended complaint.

3. That on the 11th day of September, 1876, the same as to other land described in the amended complaint.

4. That on the 14th day of June, 1877, the same as to other land described in the amended complaint.

Then follows the following:

"That under and in pursuance of a statute of this "State, to wit: The Act entitled 'an Act to provide for "'determining the rights of parties in certain swamp "'and overflowed lands in Fresno and Kern Counties,' "approved March 20, 1878, it was in the case of "*People* v. *Center et al.*, in the late District Court of "the Twelfth Judicial District in and for the City and "County of San Francisco, State of California, by a "decree of said Court, filed the 17th day of Septem-"ber, 1878, ordered, adjudged and decreed that "Miller, Lux and Crocker (the plaintiffs herein) have "judgment, and are entitled to a patent, as in said Act "provided, for the following portion of said lands, "to wit:"

Tr., Vol. 1, fols. 344–5.

[Then follows a description of 7240 acres of land that is described in the amended complaint.]

The second finding is in the words and figures following:

"2.

"That the said lands described in the patents mentioned in finding No. 1 were, until granted by the "State, as set forth in said finding, the property of "the State of California, and said State was the "owner thereof, and the plaintiffs had not, prior to "the issuance of said patents, any right, title, interest, "claim, demand or possession, legal or equitable, of, "in or to said lands, or any part thereof; and that the "said lands mentioned in said finding No. 1 as having, "in the case of *People* v. *Center et al.*, been adjudged "and decreed to these plaintiffs, were, until the filing "of the decree in the said case of *People* v. *Center*, "the property of the State of California, and said "State was the owner thereof, and the plaintiffs had "not, prior to said filing of said decree, any right, "title, interest, claim, demand or possession, legal or "equitable, of, in or to said lands, or any portion "thereof."

The title acquired by the patents relate back to the first step taken to acquire title,

Stark v. *Barrett*, 15 Cal,, 366,

Cothrin v. *Tuber*, 4 W. C. R., 295,

which was at least one year prior to the issuance of the patents.

§ 3521 Polit. Code.

Fifty days after the "approval," plaintiffs made part payment for the land, which must have been ten months and ten days prior to the issuance of the patent.

§ 3440 Polit. Code.

After this payment, the State held the naked legal title in trust for plaintiffs.

"Henceforth the purchaser became the owner of the entire beneficial interest in that quantity of land."

Bloodworth v. *Lake*, 33 Cal., 262.

The title acquired to 7240 acres of land under the Act, related back to the first step recognized in that Act as giving plaintiffs a claim to the land, i. e. the patent of November 11, 1867.

The recitals contained in the decree Vol. 2, fol. 112–13, shows that plaintiff had a *claim to or interest in* the land long before the decree was entered in the case.

The finding (2d), is not that they had no *legal* claim or interest; it is that they had no "right, title, interest, "demand or possession, legal or *equitable*, of, in or to "said land or any part thereof."

In support of this contention we refer your Honors to pages 423–4 of our points and authorities, to our brief in reply, pages 18–26, and *ante* p.

The findings in relation to Buena Vista Slough being a watercourse down to Sec. 24, T. 29 S., R. 23 E., are clearly contradictory.

The findings upon the fact as to whether plaintiffs' land is situated on and along a channel or watercourse, the findings from which the Court finds its conclusion of law that plaintiffs are not riparian proprietors, are contradictory.

The findings as to whether or not the channel of Buena Vista Slough extends as far as the Bonestell House, or to Sec. 24, T. 29 S., R. 23 E., are six in number.

Nos. 3, 18, 45, 46, 71 and 72.

FINDINGS NOS. 3 AND 18.

"3.

"That the said lands of "plaintiffs are situated in "and form part of the body "of swamp and overflowed "lands designated in these "findings and on the map "hereto annexed as Buena "Vista Swamp; but that "said lands do not, nor "does any part thereof, "border on Buena Vista "Slough, nor are said lands, "or any part thereof, situ-"ated along Buena Vista "Slough, except that as "is set forth in findings "18, 71 and 72. *The "channel of said slough is "traceable through the west "half of Section Ten* (10) "*and the northeast quarter "of Section Five* (5), *in "Township Thirty* (30) "*south, Range Twenty-four "* (24) *east, and as far north "as Section Twenty-four "* (24), *in Township Twenty-"nine* (29) *south, Range "Twenty-three* (23) *east,* "Mount Diablo Base and "Meridian; and that the "said lands of plaintiffs "are, as shown on the an-"nexed map, situated in "said Buena Vista Swamp, "to which the term Buena "Vista Slough is some-"times applied.

"18.

"That, in part, the dia-"gram annexed to the com-"plaint herein shows the "courses and channels of "Kern River, and the "sloughs and lakes in said "complaint mentioned, but

FINDINGS NOS. 45 AND 46.

"45.

"That the said lands of "plaintiffs have never bor-"dered or been situated, in "whole or in part, upon "any watercourse or natu-"ral stream.

"46.

"That no watercourse or "natural stream flows or "flowed to, along, by, "through, over or upon "said lands of plaintiffs, or "any part thereof."

" not fully and correctly,
" and except in the par-
" ticular in finding No. 72
" specified, the same are
" correctly and fully shown
" and delineated on the map
" hereto annexed, marked
" 'Exhibit A,' and made
" part of these findings;
" and said map marked
" 'Exhibit A' correctly
" shows the body of swamp
" and overflowed lands with-
" in Kern County, which
" is referred to in these
" findings as 'Buena Vista
" 'Swamp.'"

By finding 3 it is found that "the channel of said "slough is traceable through the west half of Section "Ten (10) and the northeast quarter of Section Five "(5), in Township Thirty (30) south, Range Twenty-"four (24) east, and as far north as Section Twenty-"four (24), in Township Twenty-nine (29) south, Range "Twenty-three (23) east."

The map referred to in finding 18 shows a well-defined slough through Sections 10 and 5.

By finding 45 the Court finds that none of the lands of plaintiffs border or are situated on any watercourse or natural stream.

And to make the contradiction more marked, the 46th finding finds that there is no watercourse or natural stream flows or flowed to, along, by, *over* or *upon* any of the lands of plaintiff.

(Finding No. 72 contains no exception that qualifies finding 18.)

"71.

"That from the point
" where New River enters
" Buena Vista Slough, a
" channel extends souther-
" ly into Buena Vista Lake,
" as shown upon the map
" hereunto annexed. That
" from said point where said
" river enters said slough
" to and into Buena Vista
" Swamp as far north as
" Section Twenty-four (24),
" Township Twenty-nine
" (29) south, Range Twen-
" ty-three (23) east, there is
" a traceable, but in places
" detached channel (shown
" on the annexed map, and
" thereon designated as Bu-
" ena Vista Slough) of va-
" rying width and depth.
" *That from the river north-*
" *erly to said swamp, said*
" *channel is well defined*, but
" after reaching said swamp
" to its northern extremity
" in said Section Twenty-
" four (24), said channel is
" not well defined nor con-
" tinuous, and is not a de-
" fined natural channel with
" bed and banks, but con-
" sists more of a series of
" holes than a regular wa-
" ter-way. That said chan-
" nel terminates in and is
" not traceable beyond said
" Section Twenty-four(24)."

* * * * *

"72.

" *That the portion of Bu-*
" *ena Vista Slough from New*
" *River to Buena Vista Swamp,*
" *though continuous and well*
" *defined, is in places shallow*
" *and does not constitute a*
" *watercourse*, and the wa-
" ters which from the over-
" flows, elsewhere in these
" findings mentioned, reach
" said swamp over the sur-
" face of the country; are
" not confined to the bed
" and banks of said slough,
" but spread and flow as
" well over the adjacent
" country as through the
" slough itself; and that
" such flow is not usual,
" definite, or accustomed,
" as is, nor does it corres-
" pond with that of the wa-
" ters in, Kern River before
" reaching Buena Vista and
" Kern Lakes, but is only
" occasional, as is in these
" findings elsewhere de-
" scribed. That the slough
" or channel marked on the
" annexed maps as Buena
" Vista Slough is as far
" northward as, and until
" reaching Buena Vista
" Swamp, known as and call-
" ed, Buena Vista Slough;
" but after reaching said
" swamp and ceasing to be
" well defined or continu-
" ous, as in these findings
" set forth, it ceases to be
" distinguished as Buena
" Vista Slough, and the
" term Buena Vista Slough
" is then applied to and
" used to designate the
" whole of said swamp, and
" not any particular chan-
" nel therein."

The portion of finding 71 that is italicized is in direct conflict with the portion in italics in the 72d finding, and no other portion of the finding helps to clear up the contradiction.

The italicized portion of finding 72 is in conflict with finding 18, which finds that Exhibit "A" is correct, and that upon it "are correctly and fully shown "and delineated the courses of the channels of Kern "River and the slough (Buena Vista), and the lakes "in said complaint mentioned."

On this map is shown and delineated a well-defined channel from New River to the southern line of the Buena Vista Slough land, and also a well-defined channel, with the exception of two short breaks in Section 15, T. 30 S., R. 24 E., down to Section 24, T. 29 S., R. 23 E., a distance of some fifteen miles.

The 50th and 62d findings are contradictory:

"50

"That except the said "Buena Vista swamp and "except the sxteenth (16th) "and thirty-sixth (36th) sec- "tions in each township, "which belong to the State "of California, all the lands "delineated upon and em- "braced by the map hereto "annexed marked "Exhibit "A," are and always have "been public lands of the "United States of America."

"62

"That from the South "Fork down to Buena Vista "Slough, a distance of about "twenty-five miles, on both "sides of Kern River, and "extending many miles "therefrom, there are large "tracts of land, embracing "many thousands of acres, "and very valuable and pro- "ductive, and capable of "sustaining a large popula- "tion, when artificially irri- "gated, but which, when "not so irrigated, were and "if deprived of such irriga- "tion would again become "barren and unproductive "and valueless; that the "said lands can only be irri- "gated by appropriating "and diverting and convey- "to them the waters of said "river, and that ever since

" the year 1864, and earlier
" it has been customary for
" all parties so desiring to
" so divert, appropriate and
" convey said waters on to
" said lands; and that in ac-
" cordance with said custom
" and in conformity with
" lrw, prior to the first day
" of May, 1872, several ap-
" propriations were made
" and several canals have
" been constructed in pur-
" suance and consumma-
" tion thereof, and that since
" said last mentioned date,
" and before the first day of
" May, 1875, in accordance
" with said custom, and in
" conformity with law, a
" large number of appro-
" priations were made and
" many canals have been
" constructed in pursuance
" and execution thereof;that
" the larger of said canals
" are correctly delineated
" and named on said map,
" hereto annexed, and that
" at the time of the com-
" mencement of this action
" the said lands were irri-
" gated, and for many years
" prior theroto had been
" irrigated, with the said
" waters so appropriated
" through said canals, and
" in consequence thereof,
" said lands had become
" profitable, productive and
" valuable, and settled upon
" and occupied by a large
" number of persons and
" families, and covered with
" grain fields, vineyards,
" orchards, gardens and
" homes; and that if de-
" prived of such water, said
" lands will again become
" utterly barren, desert, and
" worthless."

By the 50th finding it is found that all of the land delineated on Exhibit "A," which includes all of the land along Kern River, from Bakersfield to Buena Vista Slough, "are, and always have been, public lands."

By the 62d finding it is found that before the 1st day of May, 1875, large canals were constructed to irrigate large tracts of land along Kern River, and that they were irrigated, and that "in consequence thereof "said lands had become profitable, productive and "valuable, *and settled npon and occupied by a large* "*number of persons and families, and covered with grain* "*fields, vineyards, orchards, gardens* AND HOMES; and "that if deprived of such water said lands will again "become utterly barren, desert and worthless."

A person in possession of land is presumed to be its owner; it is only vacant land that is presumed to be owned by the United States Government.

After "HOMES" are built upon lands, and they are "*settled upon and occupied by a large number of persons* "*and families, and covered with grain fields, vineyards,* "*orchards and gardens,*" there no longer exists a presumption that such lands are public lands of the United States.

In this connection we call attention to our points and authorities, p. 409, where we make the point that the 50th finding is contrary to the evidence and to our brief in reply (pp. 347–51), where we give at length testimony to show that a great number of parties resided on the land that is found to belong to the United States, and also our authorities in support of our contention.

We also refer to the following cases, all of which were sent back for a new trial, the findings being inconsistent:

In the case of

Southmayd v. *Berry*, 3 W. C. R., 29,

this Court refused to consider the case on its merits, on the ground that the findings were indefinite and inconsistent, saying:

"The findings in this case are indefinite, and are "inconsistent with each other and with the averments "of the complaint.

"Judgment reversed and cause remanded, with leave "to the plaintiff to amend her complaint if she shall "be so advised."

The case of

Sloss v. *Allman*, 64 Cal., 47,

met the same fate in this Court in bank.

So in

Paige v. *Rocky Ford C. & I. Co.*, 4 W. C. R., 522,

the judgment was reversed and a new trial ordered, the Court saying:

"The findings are too indefinite and uncertain to "sustain the judgment."

37TH AND 76TH FINDINGS.

To the 37th and 76th findings we desire to call your Honors' special attention.

We have but to place them before your Honors for you to see that they cannot be supported by the evidence.

"37.

"That the waters of Kern River rise amongst the "highest mountains of the Sierra Nevada, where there "is at times a great accumulation of snow; that at "such times the melting of the snow is liable to "cause great and irresistible floods; that the river "bed below the foothills is shallow, and of insufficient "capacity in time of flood to carry off the waters "which then sweep over the adjacent country; that "such accumulation of snow is not usual or accus-"tomed, but is only occasional and in rarely recurring "years.

"76.

"That during the irrigation season of the year the "amount of water diverted from Kern River by de- "fendant is not sufficient to materially affect or sub- "stantially diminish the volume or amonnt of water "usually reaching Buena Vista Slough; and that "during the balance of the year none of the water by "defendant diverted would, if not so diverted, ever, in "its natural flow, flow to or reach the said lands of "plaintiffs, or any part thereof."

We do not think it necessary to add anything to what we said in our points and authorities (pp. 407 and 419-20), and in our brief in reply (pp. 339-340 and 358-9), where we make the point that neither of these findings is supported by the evidence, if any evidence is necessary, to show that they are contrary to the evidence adduced in this case.

RULINGS OF THE COURT COMPLAINED OF BY APPELLANT.

The numerous rulings of the Court made during the progress of the trial, and of which we complain, are pointed out by us in our points and authorities, pages 32 to 102, and to that portion of our points and authorities we call special attention, as we have there fully pointed out our objections to the several rulings complained of, and the authorities in support of our positions taken.

As counsel for respondent have presented nothing in support of the rulings we complain of, we have never had occasion to add anything to what we on those pages said, except as to the specific rulings which your Honors called our attention to and desired us to address ourselves.

MANNER IN WHICH THE FINDINGS WERE DRAWN AND SIGNED, AND, AFTER BEING SIGNED, A FINDING SET ASIDE AND ANOTHER SUBSTITUTED IN ITS PLACE.

It is necessary for this Court to know just how the findings found their way on file in the condition they are, to thoroughly appreciate the inconsistencies and contradictions found in them, and the absence of findings on issues, the Court had decided on motion to strike out, to be material, the fact that there are findings overturning the laws of nature, and the general mixing of findings of fact and conclusions of law. We refer your Honors to our brief in reply, pp. 304–307, where we have referred to the evidence, showing the manner in which the findings were prepared and signed, and also the peculiar manner adopted to change them after they were signed and filed.

The bill of exceptions on order denying motion to strike out the substituted finding, will be found in Transcript, Vol. 1, pp. 126–7.

THE JUDGMENT IN THIS CASE MUST BE REVERSED, FOR WANT OF FINDINGS UPON MATERIAL ISSUES RAISED BY THE PLEADINGS.

If the Court does not find upon all the material issues, the case must go back for a new trial, and it makes no difference that there is no other error in the record.

In the case of

S. P. R. R. Co. v. *Crampton*, 63 Cal., 537,

the Superior Court failed to find upon a single issue presented by the pleadings.

The Court say:

"It will be seen from the preceding recapitula-
" tion that there was no finding upon the issue above
" stated.
"The cause must therefore go back for a new trial,
" that there may be a finding on the issue men-
" tioned. We find no other error in the record." (P. 538).

So in the case of

Roeding v. *Perasso*, 62 Cal., 515,

an action to abate a dam erected on the land of a lower riparian proprietor, by which it was alleged that the land of the plaintiff was overflowed. The defendant denied the allegations of the complaint, and pleaded the Statute of Limitations. There was no finding upon the plea of the Statute of Limitations.

The Court refused to examine the case on its merits, saying (p. 516):

"The findings in this case do not respond to the
" issues presented by the pleadings. The judgment
" and order are therefore reversed, and the cause re-
" manded for a new trial."

So in the case of

Paulson v. *Nunan*, 54 Cal., 123,

there were no findings on material issues, and the Court say (p. 124):

"*And we will have to follow the usual course in this* "*case.*
"We all think that the judgment and order must be "reversed, and the cause remanded for a new trial, "and it is so ordered."

So in

Byrnes v. *Claffey*, 54 Cal., 155,

the Court say (from the Bench):

"The Court below failed to find upon material issues "raised by the pleadings.
"Judgment and order reversed and cause remanded "for a new trial."

Before the trial of this action the plaintiffs moved to strike out certain affirmative defenses contained in the defendants' answer as sham, irrelevant and redundant.

See

Bill of Exceptions on denying such motion. Tr., Vol. 1, fols. 271–329.

The motion was denied, the Court holding that the specific defenses were proper defenses, and relevant and material.

Still, on the issues raised by the affirmative defenses there are no findings.

In our points and authorities we fully present our views on this point, claiming:

1st. That it was error to refuse to strike out the specific defenses that our motion was aimed at.

2d. If this was not error, and the defenses were material, "then the judgment must be reversed for want of findings on material issues."

On page 24 of our points and authorities we say:

"If the several rulings were correct, and the several defenses should remain as a portion of defendants' answer being material to its defense, then the decision of the lower Court must be reversed for want of finding on such material issues, for all of such allegations are deemed controverted by plaintiff."

§ 462, C. C. P.

We call your Honors' attention to what follows in our points and authorities, pages 25–32, and particularly to the table on page 30, which shows that over 250 pages of the 858 pages taken up by defendants' testimony is devoted to proving up rights of canal companies other than the defendant, set up by a specific or affirmative defense, and as to which there are no findings.

And we call attention to the fact that all of this testimony went in under our objection.

Upon this point made by us, that it was error to deny plaintiffs' motion to strike out such defenses, and then to not find upon the issues raised by such defenes, counsel have ever maintained a very judicious silence.

But counsel for respondent are now seeking a reversal of this case upon a finding of fact which finds that a canal company, not a party to this suit, is appropriating the water of Kern River, and of course to make this point they must admit that the findings 67, 68 and 69 are upon immaterial issues.

We also refer the Court to the case of

West v. *Girard*, 3 W. C. R., p. 648,

an action for the abatement of a private nuisance caused, as alleged, by the filling up of a natural watercourse.

The Court failed to find upon material issues.

The Court say, McKee, J.:

"Where material issues in a case are not disposed "of by the verdict of a jury or the findings of a Court, "there must be a new trial.

"But it is urged that the issues were immaterial, "because, besides the averments in the complaint "which were traversed by the answer of the defend- "ant and raised the issues which were not dsiposed of, "it was also averred that the land of the plaintiff "'slopes south toward the land of defendant, and the "'water which passes through the said watercourse, and "'the surface water which falls upon and passes over "'plaintiff's land flows upon the land of defendant "'when allowed to pursue its natural course.'

"The action was for the abatement of a private "nuisance, caused, as alleged, by the filling up of a "natural watercourse, and by the obstruction by an em- "bankment therein, of the natural flow of the water, so "as to turn it back upon the plaintiff's land to his "damage. It was not an action, as in *Ogburn* v. *Con-* "*nor*, 46 Cal., 346, to prevent the obstruction of the "natural flow of surface water from the land above, "upon an adjacent lower tract. In that case 'there "'was no stream or watercourse upon the plaintiff's "'land.' In this it is alleged that there was a 'natural "'watercourse,' and that by its obstruction the injury "complained of was caused. If such a watercourse "existed as alleged, then, as to it, the plaintiff and de- "fendant were riparian proprietors, and it would not "be lawful for either of them to do any act which "would interfere with the rights of the other therein. "A watercourse constitutes part of the soil through "which it extends, and when used for any beneficial "purpose in connection with proprietary rights it can- "not be filled up or obstructed by any proprietor to "the injury of another."

"If, therefore, the surface water falling upon the "plaintiffs' land, 'when allowed to pursue its natural "'course,' flows into and through a natural water- "course from the plaintiff's land upon the land of the "defendant, the latter has no right to fill up the water- "course, or to build in it an embankment or other "barrier on his own land to obstruct the natural flow "of the surface water, or of the water of the stream, "and force it back upon the plaintiff's land. When "co-terminous tracts of land are in that position, the "lower tract owes a servitude to receive the surface "water from the upper tract, especially if the water

" turns into a watercourse extending through both " tracts, or on to the lower tract; and the right of the " owner of the dominant tract to have the water reach " the watercourse, either on his own land or upon " the land of the servient owner, cannot be interfered " with. The water cannot be forced back upon the " dominant tract by any act of the servient owner. " The owner of the dominant tract has a right to its " natural flow into the watercourse. But to support a " judgment for the violation of such a right, the exist- " ence of the watercourse and its obstructions, if " questions at issue, must be admitted, or proved and " found, by the verdict of the jury or the finding of " the Court. The allegations, finding and judgment " must correspond.

" Judgment and order reversed and cause remanded " for a new trial.

" We concur in the judgment upon the ground that " all of the material issues of fact were not determined " in the Court below.

" Ross, J., and McKinstry, J., concurred."

This case is not only an authority for appellants in support of their contention that, in any event, a new trial must be granted herein for want of findings upon material issues, but it fully sustains the doctrine we have contended for as to what constitutes a water-course, and as to the rights of a riparian owner upon a natural stream of water.

GENERAL INDEX OR REFERENCE TO FINDINGS WHICH APPELLANTS CLAIM ARE NOT SUPPORTED BY THE EVIDENCE, BUT ARE CONTRARY THERETO.

In our Points and Authoritie we have pointed out what findings we claim are not supported by the evidence, commencing on page 103:

To 2d Finding—We have devoted pages 103–9 of our Points and Authorities;
And pages 18 to 55, Part I, of our Brief in Reply;
And pages 29–46, *ante*.

To 3d Finding—Pages 109 to 387 of our Points and Authorities;
Pages 56 to 304, Part I, of our Brief in Reply;
And pages 73–75, *ante*.

To 7th Finding—Page 396 of our Points and Authorities.

To 9th Finding—Pages 396–7, Points and Authorities.

To 11th Finding—Pages 397–400, Points and Authorities;
Pages 345–7, Part I, Brief in Reply.

To 15th, 21st and 22d Findings—Pages 400–1, Points and Authorities;
Pages 325–6, 347–51, Part I, Brief in Reply.

To 18th Finding—Page 401, Points and Authorities;
Pages 232–289, Brief in Reply, Part I.

To 23d Finding—Pages 401–2, Points and Authorities;
Page 32, Part I, Brief in Reply.

To 24th and 25th Findings—Pages 402–3, Points and Authorities;
Page 327–8, Part I, Brief in Reply.

To 27th Finding—Page 403, Points and Authorities;
Pages 327–8, Part I,Brief in Reply.

To 28th Finding—Page 404, Points and Authorities;
Pages 328–9, Part I, Brief in Reply.

To 30th and 31st
Findings—Page 405, Points and Authorities.

To 33d Finding—Page 405, Points and Authorities;
Page 343, Part I, Brief in Reply.

To 34th Finding—Page 405, Points and Authorities;
Page 343, Part I, Brief in Reply.

To 35th Finding—Page 406, Points and Authosities.

To 36th Finding—Page 406, Points and Authorities;
Page 337, Part I, Brief in Reply.

To 37th Finding—Page 407, Points and Authorities;
Page 358, Part I, Brief in Reply;
And page 91, *ante.*

To 38th Finding—Page 407, Points and Authorities.

To 40th Finding—Pages 407–8, Points and Authorities.

To 43d Finding—Page 408, Points and Authorities;
Pages 337–8, Part I, Brief in Reply.

To 45th to 49th
Findings—Page 409, Points and Authorities.

To 50th Finding—Page 409, Points and Authorities.

To 51st Finding—Page 410, Points and Authorities;
Pages 311–316, Part I, Brief in Reply.

To 52d Finding—Page 410, Points and Authorities.

To 55th Finding—Pages 410–11, Points and Authorities;
Page 317, Part I, Brief in Reply.

To 56th Finding—Page 411, Points and Authorities;
Pages 321-3, Part I, Brief in Reply.

To 57th Finding—Pages 411–12, Points and Authorities;
Pages 323–4, Part I, Brief in Reply.

To 60th Finding—Page 412, Points and Authorities.

To 61st Finding—Pages 412–13, Points and Authorities.

To 62d Finding—Page 413, Paints and Authorities;
Page 344, Part I, Brief in Reply;
And pages 90–91, *ante*.

To 63d Finding—Pages 413–14, Points and Authorities.

To 64th Finding—Page 414, Points and Authorities;

To 65th Finding—Page 414, Points and Authorities;
Pages 330–336, Part I, Brief in Reply.

To 66th Finding—Page 414, Points and Authorities.

To 68th Finding—Page 415, Points and Authorities.
And pages 56–62, *ante*.

To 69th Finding—Page 415, Points and Authorities;
And pages 56–62, *ante*.

To 70th Finding—Page 415, Points and Authorities;
And pages , *ante*.

To 71st Finding—Page 416, Points and Authorities;
And pages 87–8, *ante*.

To 72d Finding—Page 416, Points and Authorities;
And pages 87–8, *ante*.

To 73d and 74th
Findings—Pages 416–17, Points and Authorities.

To 75th Finding—Pages 417–19, Points and Authorities;
And pages 80–82, *ante*.

To 76th Finding—Pages 419–22, Points and Authorities;
Pages 339–40, Part I, Brief in Reply;
And page 92, *ante*.

To 77th Finding—Page 422, Points and Authorities;
Pages 340–2, Part I, Brief in Reply.

To 78th Finding—Page 422, Points and Authorities.

To 79th Finding—Pages 387–396, Points and Authorities;
Page 353, Part I, Brief in Reply;
And pages 76–78, *ante.*

Respectfully submitted,

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San Francisco, June 23d, 1885.

Service accepted by copy, this 24th

day of June 1885

Louis J. Haggin

Attorney for Respondents.